SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 73-

HARVEY S. OWEN, individually and doing business as HARVEY'S GUEST HOUSE and JUNE CROWNOVER,

Petitioners,

vs.

JAMES A. MUSICK, in his capacity as Sheriff of the County of Orange, State of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

KENNETH PHILIP SCHOLTZ
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TOPICAL INDEX

	Page
Table of Authorities	iv
PETITION FOR WRIT OF CENTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTORY PROVISIONS INVOLVED	6
STATEMENT OF THE CASE	13
REASONS RELIED ON FOR ALLOWANCE OF WRIT	21
I ORANGE COUNTY ORDINANCE NO. 2356 IS INVALID AS AN ATTEMPT TO REGULATE SEX AND ENTERTAINMENT WITHOUT REGARD TO CONSTITUTIONAL DEFINITIONS OF OBSCENITY	21
II ORANGE COUNTY ORDINANCE NO. 2356 IS INVALID AS AN ATTEMPT TO REGULATE SEX AND ENTERTAINMENT WITHOUT THE SUPPORT OF THE TWENTY-FIRST AMENDMENT	25

		Page
III	AN ORDINANCE WHICH REGLATES THE ATTIRE OF ENTERTAINERS AND PERFORMERS IS A REGULATION OF SPEECH PROTECTED BY THE FIRST AMENDMENT AND NOT MERELY A REGULATION OF CONDUCT	28
	A. Introduction	28
	B. Ordinance No. 2356 is Not a Prohibition of Nudity in Public Places	30
	C. Protected Speech May Not Be Subjected to Improper State Regulation by Breaking it Down Into its Component Parts	34
	D. Freedom of Speech is Not Limited to the Communication of Words.	38
IV	THE INSTANT ORDINANCES CANNOT BE JUSTIFIED AS A REGULATION OF COMMERCIAL SPEECH	42
V	ORANGE COUNTY ORDINANCE NO. 2356 IS NOT A VALID INCIDENTAL REGULATION OF SPEECH WITHIN THE TESTS SET FORTH IN UNITED STATES V. O'BRIEN	48
VI	THE EXEMPTION GRANTED THEATRES, CONCERT HALLS, AND SIMILAR ESTABLISHMENTS IN ORDINANCE NO. 2356 DENIES PETITIONERS THE EQUAL PROTECTION OF THE LAWS	58

Page

CONCLUSION 62

APPENDIX A

Opinion of California Supreme Court
Crownover v. Musick
LA 29917

APPENDIX B

Opinion of Court of Appeal
Crownover v. Musick
Civ. 10517

APPENDIX C

Order granting preliminary injunction,
Superior Court of California
No. 170792

APPENDIX D

Order Denying Rehearing
May 30, 1973

APPENDIX E

Affidavit of Harvey S. Owen

TABLE OF AUTHORITIES

Cases	Page
Barrows v. Municipal Court 1 Cal. 3d 821 83 Cal.Rptr.___	17
California v. LaRue 409 U.S. ___ 93 S.Ct. 390 (1972)	4, 16 20, 22 23, 25-28
City of Portland v. Derrington 253 Or. 289, 451 P.2d 111 (1969) cert. denied	42, 44, 45
Cohen v. California 403 U.S. 15 (1971)	4
Crownover v. Musick 9 Cal.3d___, 107 Cal.Rptr. 681	2, 24, 31, 34 36, 38-41, 47 51, 54, 58
Glancy v. Sacramento	46
Hoffman v. Carson 250 S.2d 891 (Fla. 1971) cert. denied	45
In Re Gianinni 69 Cal.2d 563 72 Cal.Rptr. 655 (1968) cert. denied	17, 18 20, 21
Kois v. Wisconsin 408 U.S. 299 (1972)	21

Cases	Page
Miller v. California fn.2, ___U.S.___ ___S.Ct.___ (June 21, 1972)	22-24
NAACP v. Button 371 U.S. 415 83 S.Ct. 328 9 L.Ed.2d 405 (1963)	41
Paris Adult Theatre I v. Slaton ___U.S.___ ___S.Ct.___ (June 21, 1973)	43
Roth v. United States 354 U.S. 476 (1957)	22
Schact v. United States 398 U.S. 58 (1970)	47
Shapiro v. Thompson 394 U.S. 618 (1969)	60
United States v. O'Brien 391 U.S. 367	19, 23, 48-50 52, 54, 60

Codes	Page
California Penal Code:	
§311.6	25
§318.5	6, 13, 16
§318.6	13, 16
28 U.S.C. §1247(3)	2
4 Cal.Adm. §145.5	28
Constitution	
California Constitution Article 20, §22	27
Ordinance	
Orange County Ordinance No. 2356	4, 5, 8, 13 16, 18-24, 26 29-33, 38, 40 44, 46, 48, 55, 58
Rules	
California Department of Alcoholic Beverage Control Rule 143.5	28

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PETITION FOR
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STATE OF CALIFORNIA

Petitioners, Harvey S. Owen and June Crownover respectively pray that a Writ of Certiorari be issued to review the final judgment of the Supreme Court of the State of California entered in the above matter on May 1, 1973.

OPINIONS BELOW

The written decision of the California Supreme Court sub nom Crownover v. Musick is reported at 9 Cal.3d___, 107 Cal.Rptr. 681. A copy of the Opinion of the California Supreme Court is set forth in Appendix A. The Opinion of the Court of Appeal for the Fourth Appellate District of the State of California which was vacated by the decision of the California Supreme Court is reported at 18 Cal.App.3d 181, 95 Cal.Rptr. 691. A copy of the Opinion of the Court of Appeal is attached hereto as Appendix B.

The Decision and Opinion of the Superior Court of the State of California for the County of Orange granting a preliminary injunction to petitioners herein is set forth in Appendix C.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3) with respect to the final judgment of the California Supreme Court in Crownover v. Musick, No. L.A. 29917, the decision and opinion of the

California Supreme Court was filed on May 1, 1973 and a Petition for Rehearing and for Stay was denied on May 30, 1973. A copy of the Order denying a rehearing is set forth in Appendix D.

QUESTIONS PRESENTED

1. May a state prohibit nudity on the part of entertainers or performers when the entertainment or performance is not obscene.

2. May a state prohibit the exposure of the genitals, buttocks or breasts of entertainers or performers when the entertainment or performance is not obscene.

3. May a state prohibit the appearance or simulation of the exposure of the genitals, buttocks or breasts of entertainers or performers when the entertainment or performance is not obscene.

4. May a state regulate the attire, costuming or appearance of entertainers and performances without regulating the content of the entertainment or performance.

5. May a state enact regulations of the type approved in California v. LaRue, 409 U.S. 109, which regulate performances protected by the First Amendment, if the regulations are not in the exercise of the state's power to license the sale and consumption of alcoholic beverages under the Twenty-First Amendment.

6. Does an ordinance which prohibits entertainers and performers from exposing their genitalia, buttocks or breasts other than in a theatre or concert hall regulate speech.

7. Is freedom of speech under the First Amendment limited to verbal communication or does it extend to non-verbal communication, through music, dancing, drama and the arts.

8. May an otherwise unconstitutional regulation of speech be justified by being expressed in terms of conduct which is a component part of the speech.

9. Can Orange County Ordinance No. 2356 be justified as a regulation of speech used solely for commercial purposes to promote the sales of food and drink.

10. Should Orange County Ordinance No. 2356 be construed to apply only where the regulated performance or entertainment is offered for the primary purpose of promoting the sale of food or drink or other items of commerce.

11. Is Orange County Ordinance No. 2356 a direct or incidental regulation of speech.

12. If Orange County Ordinance No. 2356 is only an incidental regulation of speech,

a) does it further a substantial or important governmental interest.

b) is it unrelated to the suppression of free expression.

c) is the incidental restriction no greater than is essential to whatever substantial or important interest which might be furthered thereby.

13. Is a substantial or important governmental interest furthered by legislation whose sole purpose is to vindicate the moral opinions of a portion, even a majority, of the population.

14. Is a substantial or important governmental interest furthered by legislation

whose purpose is to prevent tawdry or vulgar entertainment.

15. Is it a denial of equal protection of the laws to permit an entertainer or performer to expose her breasts or his or her genitals or buttocks in a theatre or concert hall while prohibiting the same performance from being presented in a bar, restaurant or other place of public entertainment.

STATUTORY PROVISIONS INVOLVED

1. Section 318.5 of the California Penal Code, which provides as follows:

> "Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a county or city, if such ordinance directly regulates the exposure of the genitals or buttocks of or the breasts of any person who acts as a waiter, waitress, or entertainer, whether or not the owner of the establishment in which the activity is performed employs or pays any compensation to such a person to perform such

activity, in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment.

"The provisions of this section shall not apply to a theatre, concert hall, or similar establishment which is primarily devoted to theatrical performances.

"This section shall be known and may be cited as the Quimby-Walsh Act."

2. Section 318.6 of the California Penal Code, which provides as follows:

"Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county, if such ordinance relates to any live acts, demonstrations, or exhibitions which occur in public places, places open to the public, or places open to public view and involve the exposure of the private parts or buttocks of any participant or the breasts of any female

participant, and if such ordinance prohibits an act or acts which are not expressly authorized or prohibited by this code.

"The provisions of this section shall not apply to a theatre, concert hall, or similar establishment which is primarily devoted to theatrical performances."

3. Ordinance No. 2356[1/] of the County of Orange, California, which provides in pertinent part:

"Section 1. Division 11 is hereby added to Title 3 of the codified ordinances of the County of Orange to read as follows:

DIVISION 11

UNLAWFUL EXPOSURE OF PRIVATE PARTS AND FEMALE BREASTS

Article 1

"Exposure by Waiters, Waitresses and Entertainers.

1/ The ordinance was inadvertantly numbered 2536 in the opinion of California Supreme Court.

"Section 311.011 Prohibitions: Definitions: Waiters, Waitresses, Entertainers.

"Every person is guilty of a misdemeanor who, while acting as a waiter, waitress or entertainer in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such an establishment:

"(a) Exposes his or her genitals, pubic hair, buttocks, natal cleft, perinium, anal region or pubic hair region; or

"(b) Exposes any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, natal cleft, perinium, anal region or pubic hair region; or

"(c) Exposes any portion of the female breast at or below the areola thereof."

"Section 311.012. Counseling or Assisting.

"Every person is guilty of a mis-

demeanor who causes, permits, procures, counsels or assists any person to expose or simulate exposure as prohibited in Section 311.011.

"Section 311.013. Employment or Payment not Necessary for Offense.

"A person shall be deemed to be a waiter, waitress, or entertainer if such person acts in that capacity without regard to whether or not such person is paid any compensation by the management of the establishment in which the activity is performed.

Article 2

"Exposure by Performers in Public

"Section 311.021, Prohibitions: Definitions: Public Performance.

"Every person is guilty of a misdemeanor who, while participating in any live act, demonstration, or exhibition in any public place, place open to the public, or place open to public view:

"(a) Exposes his or her genitals, pubic hair, buttocks, natal cleft, perinium, anal region, or

pubic hair region; or

"(b) Exposes any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, natal cleft, perinium, anal region or pubic hair region; or

"(c) Exposes any portion of the female breast at or below the areola thereof.

"Section 311.022. Counseling or Assisting.

"Every person is guilty of a misdemeanor who causes, permits, procures, counsels or assists any person to expose or simulate exposure as prohibited in Section 311.021.

Article 3

Exemption of Theatrical Establishments

"Section 311.031. Exemption of Theatrical Establishments. The provisions of Article 1 and Article 2 of this division shall not apply to a theatre which is primarily devoted to theatrical performances.

"Section 2. This ordinance is

declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety, and shall become effective on this date. The facts constituting the emergency are as follows:

> "The California State Legislature has adopted Chapters 1534 and 1535, statutes of 1969,[2/] authorizing counties to adopt legislation of the sort contained herein. Said legislation became effective November 10, 1969. This board finds that the conduct prohibited herein is presently taking place within the unincorporated areas of this county and is so detrimental to the mental and moral state of the people of this county as to justify its immediate prohibition."

2/ Penal Code Sections 318.5 and 318.6, supra

STATEMENT OF THE CASE

Petitioner Harvey S. Owen is the owner of an establishment located in Orange County, California, which serves food and alcoholic beverages and, since 1967, has featured entertainment by topless (bare breasted) dancers. Petitioner, June Crownover has performed as a topless and bottomless (totally nude) dancer in premises located in Orange County

Following the enactment of Ordinance No. 2356 by the County of Orange, petitioners commenced an action in the Orange County Superior Court for declaratory and injunctive relief on the grounds that the ordinance was unconstitutional in a variety of ways. The complaint also attacked the constitutionality of Section 318.5 and 318.6 of the California Penal Code on similar grounds. The grounds alleged in the complaint were that the statutes and ordinance constitute a prior restraint against activity protected and guaranteed by the First and Fourteenth Amendments to the United States Constitution, that the statute and ordinance arbitrarily and unreasonably discriminate against plaintiffs and those

similarly situated as opposed to a theatre, concert hall, or similar establishment which is primarily devoted to theatrical performances, that the terms "theatre, concert hall, or similar establishment which is primarily devoted to theatrical performances" are constitutionally vague, indefinate, uncertain and ambiguous in violation of the Fourteenth Amendment of the Constitution, that the distinction created by the exemption for theatres, concert halls, and similar establishments is unreasonable and without any rational basis in violation of the Fourteenth Amendment.

In support of the complaint and request for preliminary injunction, petitioner Harvey Owen submitted an affidavit which set forth the facts that he was the owner of a premises known as Harvey's Guest House which was then licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of beer for consumption on the premises, that he had presented topless entertainment at Harvey's Guest House since May 1967 (a period of more than two years preceding the filing of the complaint), and that he was the owner

of the real property and business located thereon. The affidavit further stated that petitioner had been informed by the Orange County Sheriff's Department that the Sheriff would make physical arrests of any topless dancers who performed within Orange County in violation of Ordinance No. 2356 and that petitioner himself would be arrested if he were to permit such topless dancers at Harvey's Guest House.

Petitioner Harvey S. Owen recently filed an updated affidavit setting forth his present circumstances in support of a petition for stay order which was presented to Justice Douglas. A copy of his affidavit is attached hereto as Appendix E. The affidavit sets forth that petitioner has continued to present topless entertainment at Harvey's Guest House since the filing of the original complaint herein and that at no time during the approximately 6 years that such entertainment has been presented have any of the dancers employed by him been arrested or prosecuted for being lewd or obscene in the presentation of such entertainment. The affidavit further sets forth that Harveys is now licensed as a

cocktail bar where all alcoholic beverages may be sold and consumed on the premises.

Petitioners' affidavit further sets forth that his presentation of topless entertainment at Harvey's Guest House has in all respects been in compliance with the rules and regulations of the California Department of Alcoholic Beverage Control which were considered by this court in California v. LaRue, 409 U.S. 109, 93 S.Ct. 390 (1972).

A hearing was held in the Orange County Superior Court on December 3, 1969 on petitioner's request for a preliminary injunction prohibiting enforcement of Orange County Ordinance No. 2356. After hearing the court granted a preliminary injunction upon the express grounds that Penal Code Sections 318.5 and 318.6 and Orange County Ordinance No. 2356 violate the equal protection and due process clauses of the United States and California constitutions "in that there is no reasonable, logical, or factual basis for distinction wherein theatres, concert halls, or similar establishments should be excepted from the restrictions imposed by said legislation

while other establishments identical in nature, if not in name or designation, and the persons working therein are made subject to the punishment provided by said legislation." (Appendix C).

Respondent duly filed an appeal from the order granting a preliminary injunction to the Court of Appeal for the Fourth Appellate District for the State of California. On June 18, 1971 the Court of Appeal issued its Opinion affirming the granting of the Preliminary Injunction. In its Opinion, the Appellate Court stated that although the trial court acted on equal protection grounds it felt constrained to review the First Amendment aspect of the case. (Appendix B, page 3). In its Opinion, the court went on to observe that although nudity per se is not protected by the First Amendment, it does come within the protective mantle of the First Amendment when it is part of a method of expression such as a dance or a play. (Appendix B, page 4). The Court of Appeal relied on the California Supreme Court decisions in Barrows v. Municipal Court, 1 Cal.3d 821, 83 Cal.Rptr. 819, and In re

Gianinni, 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968).

The Court of Appeal went on to hold that Ordinance No. 2356 was constitutional as applied to waiters and waitresses but unconstitutional insofar as it applied to nude entertainers. Thus, the Court of Appeal affirmed the order granting a preliminary injunction insofar as it pertained to entertainers and reversed it insofar as it applied to waiters and waitresses. It should be noted, however, that the complaint originally filed by petitioners was filed only on behalf of entertainers and premises featuring entertainers, as opposed to waiters and waitresses.

On or about August 17, 1971 the California Supreme Court granted respondent's petition for hearing, thereby, as a matter of California law, vacating the opinion of the Court of Appeal. The California Supreme Court did not issue its decision until May 1, 1973, when, in a 4 to 2 decision, it upheld the constitutionality of Section 2356 and reversed the order of the Superior Court granting a preliminary injunction.

In summary form, the opinion of the California Supreme Court stated and held that Ordinance No. 2356 was directed at conduct, not words or speech, and did not present the problems raised in obscenity cases. Insofar as persons serving food and beverages are concerned, the ordinances appeared to be a proper exercise of the police power in the area not involving the First Amendment. Insofar as entertainers and performers are concerned, the court held that Ordinance No. 2356 merely proscribes nudity in specified public places. The court said the ordinance does not prohibit entertainment but merely enjoins that the entertainer or performer who offers it must have some clothes on.

The majority opinion went on to assume for the purposes of argument that some communicative element was involved in nude entertainment sufficient to bring into play the First Amendment. It then applied the four-fold test announced in United States v. O'Brien, 391 U.S. 367, and concluded that Ordinance No. 2356 satisfied all four tests.

In reaching its conclusion that Ordinance No. 2356 was valid against a First Amendment attack for overbreadth, the majority opinion held that the United States Supreme Court opinion in California v. LaRue, 409 U.S. 109 was not pertinent because the LaRue opinion only found First Amendment protection with respect to motion pictures and theatrical productions.

Having determined that Ordinance No. 2356 did not involve any activity protected by the First Amendment, the California Supreme Court proceeded to find the exemption for theatres, concert halls, or similar establishments to be proper under traditional Fifth and Fourteenth Amendment standards of due process and equal protection. The majority did not state what decision it would have reached if the ordinance had involved a suspect classification involving speech or some other First Amendment right.

At the conclusion of its Opinion, the majority announced it was overruling In re Gianinni, supra, 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968), cert. denied, insofar as it was inconsistent with the new opinion. As

observed above, Gianinni had been relied upon by the Court of Appeal in its decision affirming the preliminary injunction. The California Supreme Court's majority opinion did not otherwise discuss Gianinni or explain why its conclusions were deemed no longer to be valid.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

ORANGE COUNTY ORDINANCE NO. 2356 IS INVALID AS AN ATTEMPT TO REGULATE SEX IN ENTERTAINMENT WITHOUT REGARD TO CONSTITUTIONAL DEFINITIONS OF OBSCENITY

An ordinance which prohibits nudity in public entertainment without regard to whether or not the entertainment is obscene is the equivalent of a statute which prohibits the use of four letter words whether or not such words are used in an obscene context. Since the use of four letter words cannot be prohibited in public expression where the context is not obscene - see Cohen v. California, 403 U.S. 15 (1971); Kois v. Wisconsin, 408 U.S. 299 (1972) - nudity also may not be generally

prohibited in public entertainment and performances without regard to context of the entertainment as a whole.

Ordinance No. 2356 is, by its terms, an attempt to prohibit exposure in public live entertainment without regard to whether or not the entertainment is constitutionally obscene. Under the general scheme of regulation of obscenity in effect in this country since the decision in Roth v. United States, 354 U.S. 476 (1957), it has been clear that speech, including books, movies and live conduct which deal with sex in an obscene matter are not protected by the First Amendment, while all other speech dealing with sex is protected. See Miller v. California, fn.2, ___U.S.___, ___S.Ct.___, (June 21, 1972).

Although this court has recently affirmed the proposition that state regulation of live entertainment may be more restrictive than that of books or movies, such regulation must nevertheless fit within the obscenity framework.

Cf, California v. LaRue, 409 U.S. 109 (1972)

However, in the recent decision of Miller

v. California, supra, this court has made it clear that the greater power of the state to regulate the sexual content of live entertainment does not permit a departure from the general definition of obscenity; instead, the distinction between sex and nudity in books and movies on the one hand, and in live entertainment on the other, is subsumed within the definition of prurient appeal and patent offensiveness.[3/] Miller cited United States v. O'Brien, 391 U.S. 367 (1968) and California v. LaRue, supra. O'Brien of course comes into play only when a regulation of live conduct incidentally effects speech, not when it is directly concerned with the regulation of speech.

Moreover, in the instant case the California Supreme Court has expressly denied that there is any relationship between Orange County Ordinance No. 2356 and the regulation of obscenity. Crownover v.

3/ In fn.8 of the Opinion in Miller v. California, the court stated that " . . . the states have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior."

Musick, 9 Cal.2d ___, 107 Cal.Rptr. at p. 689, Appendix A, p. 8. Such a broad denial does not, however, solve the problem. In Miller v. California, supra, this court required a valid state prohibition of obscenity meet at least the following test:

> ". . . We now confine the permissible scope of such regulation to the works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole do not have serious literary, artistic, political, or scientific value." Miller v. California, supra, ___U.S.___, ___S.Ct.___, at p.___.

Orange County Ordinance No. 2356 fails to meet these requirements. It does specifically define the sexual conduct which may

not be displayed in live entertainment, to wit: the exposure of the female breasts or of the private parts. However, it fails to require that such exposure also appeal to the prurient interest in sex, be portrayed in a patently offensive way, and lack serious literary, artistic, political, or scientific value.[4/]

II

ORANGE COUNTY ORDINANCE NO. 2356 IS INVALID AS AN ATTEMPT TO REGULATE SEX IN NON-OBSCENE ENTERTAINMENT WITHOUT THE SUPPORT OF THE TWENTY-FIRST AMENDMENT

The Orange County ordinance involved in this case also lacks the support of the Twenty-First Amendment which saved the California alcoholic beverage regulations considered by this court in California v. LaRue, 409 U.S. 109. Those regulations were similar to the instant ordinance in that they also prohibited exposure of the

4/ California has a state law which prohibits obscene live conduct in public places; Penal Code Section 311.6.

genitals and anus without regard to whether or not the performance occurred in an obscene context. The court there said:

> "While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishment which it licenses to sell liquor by the drink."

California v. LaRue, 409 U.S. at ___, 93 S.Ct. at p. 397.

Orange County has not forbidden such performances across the board either, but it has forbidden them in all public places, including those not licensed to sell liquor by the drink. Ordinance No. 2356 does not constitute an exercise of the state's

power to license alcoholic beverages.[5/] Moreover, if the instant ordinance can be justified as a regulation of conduct rather than speech, the same justification would have supported the California Department of Alcoholic Beverage Control regulations without recourse to the Twenty-First Amendment. Such a justification was urged by the state at that time, but not adopted by the court. If such a justification were to be adopted now it would mean that the court had decided an unnecessary constitutional issue in LaRue.

California v. LaRue is applicable to the instant proceedings in another way. Petitioner Harvey Owen holds an Alcoholic Beverage Control license for the sale of liquor to be consumed on the premises. Even though the entertainment presented by him is within the limits of the rules approved in LaRue, he would nevertheless be subject to losing his license by virtue of

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5/ Indeed, it could not. Such power may be exercised only by the State Department of Alcoholic Beverage Control. California Constitution, Article 20, Section 22.

California Department of Alcoholic Beverage Control Rule 143.5 which prohibits any entertainment which violates a local ordinance regulating attire. 4 Cal.Adm. Code § 143.5. In LaRue, the claim that Rule 143.5 was invalid was withdrawn on the principle that local ordinances must be independently challenged. California v. LaRue, 409 U.S. ___, 93 S.Ct. at p. 394, fn. 2. This case is just such an independent challenge of an invalid local ordinance. If the challenge fails, petitioner could f face loss of his Alcoholic Beverage Control license in addition to those criminal penalties imposed by the ordinance itself.

III

AN ORDINANCE WHICH REGULATES THE ATTIRE OF ENTERTAINERS AND PERFORMERS IS A REGULATION OF SPEECH PROTECTED BY THE FIRST AMENDMENT AND NOT MERELY A REGULATION OF CONDUCT

A. Introduction

An essential question raised by the case is the proper characterization of the

ordinances. Petitioners have contended and do contend that Orange County Ordinance No. 2356 is a direct regulation of the attire of entertainers and performers and as such amounts to a prohibition of certain entertainment which would be protected by the First Amendment. By contrast, the California Supreme Court held that the ordinance merely regulates conduct and has no effect whatsoever on speech.

In the following argument we will show (1) that the California Supreme Court has misconstrued Ordinance No. 2356 as being the equivalent of a general prohibition against nudity in public places, when in fact it is an express restriction on the attire of performers and entertainers; (2) based its decision upon the fallacious argument that state regulation of the conduct which constitutes one of the separate components of an act of speech may be regulated or prohibited without regard to its effect upon the communication itself; (3) relied upon the fallacious argument that the freedom of speech named in the First Amendment is limited to the communi-

cation of words or verbal ideas.

B. Ordinance No. 2356 is Not a Prohibition of Nudity in Public Places

In its Opinion the California Supreme Court based its decision upon the erroneous assumption that Ordinance No. 2356 of the County of Orange is a general proscription against nudity in public places. The court said:

> "It is clear that these provisions of the ordinances are directed at conduct - topless and bottomless exposure - and not at speech or at conduct which is 'in essence' speech or 'closely akin to speech'. A commonsence construction (see People v. Davis (1968) 68 Cal.2d 481, 483, 67 Cal.Rptr. 547, 439 P.2d 651) of the pertinent provisions is that they proscribe nudity in specific public places. They do not prohibit entertainment but merely enjoin that if the entertainer or performer offers it, he or she

must have some clothes on. In a word the ordinances regulate conduct."

Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. 681, 694, Appendix A. p. 13.

The California Supreme Court's characterization of the ordinance does not bear analysis. In the first place, Ordinance No. 2356 does not prohibit nudity in express terms nor is it the equivalent of a prohibition of nudity. It does prohibit exposure of certain parts of the body, namely the genitals, buttocks and female breasts. Under the ordinance the exposure of any portion of the female breast below the areola would constitute a violation regardless of whether or not the defendant were otherwise entirely clothed. An entertainer whose neckline plunged too far could be prosecuted even though she could in no way be said to be nude. Similarly, a prosecution under the bottomless portion of the ordinance could be instituted against an entertainer who wore too brief a bikini or pair of hot pants and thus exposed what might be thought a significant portion of

her buttocks. In neither circumstance need the defendant be nude.

Moreover, Ordinance No. 2356 is not limited to actual exposure. It also forbids the wearing of any clothing which simulates or gives the appearance of those portions of the body which may not otherwise be exposed. Indeed, these provisions of the ordinance contained in Sections 311.011(b) and 311.021(b) of Ordinance No. 2356 which prohibit the simulation or appearance or exposure of the forbidden parts give the lie to the characterization of the ordinance as one involving conduct. It is not conduct which is prohibited, but appearance.

Not only is it incorrect to characterize the ordinances as being prohibitions against nudity, it is also incorrect to characterize them as being general proscriptions against the exposure of private parts, buttocks, and breasts in public places. The title of Article 1 of the ordinance shows that it is directed at "exposure by waiters, waitresses and entertainers." By its terms it applies only to a person who is acting as a waiter, waitress or entertainer in an establishment which serves food, beverages, or food and

beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such an establishment. Petitioners are concerned with the ordinance only insofar as it applies to entertainers. In this regard entertainers are expressly singled out and their appearance expressly regulated. Article 2 of the ordinance is entitled "Exposure by Performers in Public." Section 311.021 is entitled "Prohibitions: Definitions: Public Performance." It is expressly directed at those engaged in public performances by participating in "any live act, demonstration, or exhibition in any public place, place open to the public, or place open to the public view." Thus, it does not proscribe nudity, or the appearance of nudity, or the exposure of the sexual organs, nor the appearance of exposing the sexual organs, on the part of the public in general. It only forbids such exposure by entertainers and persons engaged in public performances.

C. Protected Speech May Not Be Subjected to Improper State Regulation by Breaking it Down Into its Component Parts

The court's conclusion that "the ordinances are directed at conduct, not words or speech" [Crownover v. Musick, 9 Cal.3d ___, 107 Cal.Rptr. 681, 689, Appendix A, p. 8] is based on the false principle that improper governmental regulation of speech may be justified if it is directed at a component part of the speech.

The Fallacy of the argument is pointed out in Justice Tobriner's dissenting opinion, where he said:

> "The message of all the decisions is clear: Except when exercising its extraordinary powers under the Twenty-First Amendment, the state may not ban nonobscene entertainment. But the majority believe they have found a road around this formidable constitutional protection. Entertainment, they assert, can be dichotomized into speech and conduct; the

state need not touch speech, but by barring conduct associated with that speech, the state may effectively proscribe entertainment.

"The adoption of this theory would let the censor loose without constitutional restriction to condemn at will any and all communicative entertainment. While avoiding reference to the actor's speech, the state could ban his gestures, his costuming (or amount of costuming), the positioning of the actors, the lighting of the stage, or whatever other 'conduct' it chooses. Nor is the logic of the majority opinion confined to entertainment in bars or restaurants; it applies equally to the legitimate theatre and to the motion picture. Neither is the logic of the opinion confined to the subject of nudity. If a county seeks to prohibit entertainers, or participants in a public demonstration, from

wearing long hair, fashionable dress, or uniforms (cf. Schact v. United States (1970) 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44), the majority opinion can be construed to uphold such legislation."

Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. 681, 702, Appendix A, p. 21.

Justice Tobriner's comments are not in principle limited to the regulation of entertainment. No form of expression or speech would be free if the speech/conduct dichotomy were to be as loosely applied as it was by the majority opinion. Freedom of speech cannot be exercised without some form of conduct being involved, even if it is nothing more than the mere speaking of words. In our institutionalized, complex society the communication involved in the exercise of freedom of speech and the press normally involves complex conduct by individuals, corporations, and other large business organizations. Surely, however, this Court would not permit

states to abolish the publication of newspapers by prohibiting the operation of printing presses or by enacting regulations prohibiting common carriers from transporting newsprint. Equally, this court would not permit open censorship of newspapers by regulations which might require the operation of a printing press or transportation of news print to rest in the unbridled discretion of a licensing agency. Just as it has with parade permits, the court would have no problem in determining that such matters amount to a regulation, or at least an opportunity to regulate the content of the speech involved.

Returning to the issue directly at hand: to regulate the appearance and attire of actors, dancers and enterainers is to regulate the performance itself. The appearance, staging, costuming (or lack of it) involved in any production is often essential to the impact which it presents. To boldly conclude, as does the majority of the California Supreme Court, that these ordinances "do not prohibit entertainment, but merely enjoin that if the entertainer or performer offers it, he or she must have

some clothes on." (Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. at 694, Appendix A, p. 13) is to allow the broadest form of censorship. It is more correct to say that the ordinance involved here prohibits nudity on the part of the entertainer even when the nudity is an inherent or significant part of the performance.

D. Freedom of Speech is Not Limited to the Communication of Words.

The California Supreme Court's conclusion that Ordinance No. 2356 is not a regulation of speech, and its application of the conduct/speech dichotemy, is based in large measure upon the fallacious conclusion that the First Amendment only applies to the expression of words or symbolic conduct which embodies simple verbal ideas. Much of the performing and visual arts would be placed outside the First Amendment if such a rule were to be followed. The performance of instrumental and orchestral music, the performance of dance and ballet, the performance of pantomine, the exhibition of paintings, sculp-

tures, photographs, and the other visual arts in all their manifold varieties, would be subject to governmental interference unprotected by the First Amendment under the reasoning adopted by the California Supreme Court.

Music is perhaps the most abstract of the arts. Except when wedded to words, as in opera or song, it can seldom be said to express an identifiable verbal idea, yet its power and ability to communicate emotions and feeling is without question. Surely a city ordinance which wholly forbid the playing of musical instruments would be subject to First Amendment scrutiny and could not be justified simply by a statement that musical performance involves conduct rather than speech. Yet that situation is no different from the one presented in the instant case.

Indeed, the majority opinion in Crownover appears to authorize the censorship of every aspect of the performing arts other than the speaking of words. Although the majority finds that the exemption granted to theatres and concert halls is not a violation of equal protection or

due process, it fails to give any consideration to the question of whether such an exception is constitutionally required by the First Amendment. (See dissenting opinion, 9 Cal.3d___, 107 Cal.Rptr. at p. 702, Appendix A, p. 21.) The inherent assumptions of the majority opinion support the conclusion that the exemption would not be a constitutional necessity. If so, the legislature would be free to remove the exemption granted theatres and concert halls, thereby enabling local legislative bodies to expand the ban on exposure to all public performances regardless of location.

In reaching its conclusion that Ordinance No. 2356 is valid, the court asks and answers the wrong question. The court states:

> "Is such conduct symbolic in the constitutional sense? Is this nudity in bars and other specified places open to the public so inherently communicative by nature as to call for the protection given the 'interchange of ideas . . . . [a]ll ideas having even the slight-

est redeeming social importance'
. . ."

Crownover v. Musick, 9 Cal.3d___,
107 Cal.Rptr. at p. 694,
Appendix A, p. 13.

Besides placing an undue emphasis on verbal communication, the court asks the constitutionally wrong question by focusing solely on the inherent as opposed to the possible communicative nature of the acts prohibited. The First Amendment's protection against over-broad statutes applies in any circumstance where the statute or ordinance can be applied to prohibit the exercise of freedom of speech. NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). The issue is not whether all nude performances are inherently communicative but whether any of them are. The question is not whether all nude performances are "tawdry and vulgar," but whether any of them involve a communicative artistry. The court is required under all the existing authority to strike down the ordinance as overbroad if it is capable of being applied in a manner which would impede or restrict the exercise of rights

protected by the First Amendment. This is an issue which the California Supreme Court failed to meet or discuss.

IV

THE INSTANT ORDINANCES CANNOT BE JUSTIFIED AS A REGULATION OF COMMERCIAL SPEECH

Relying in large part upon City of Portland v. Derrington, 253 Or. 289, 451 P.2d 111 (1969), cert. denied, the California Supreme Court determined that nude entertainment is not speech because it is merely a sales device or gimmick.

The court's construction of the ordinance in such a manner is, once again, a misreading of it. Indeed, it is inconsistent to state in one breath that the ordinance is merely a general proscription of nudity in public places and, in the next, to state that the ordinance amounts to a specific regulation of a commercial activity which is "nothing more than a sales gimmick."

We need not question the general principle that speech which has solely a com-

mercial purpose may be appropriately regulated. As Justice Burger has recently pointed out:

> "Neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their ware."
>
> Paris Adult Theatre I v. Slaton, ___U.S.___, ___S.Ct.___ (June 21, 1973).

However, we should point out that there is a difference between speech used as a commercial tool for the sale of other products and speech as an article of commerce itself. Newspapers, motion pictures, and television are all examples of speech which are themselves articles of commerce. The New York Times does not lose First Amendment protection merely because its owners make a profit from its sale. Similarly, where nude entertainment is itself the article of commerce; where it is presented under circumstances where customers come for the purpose of seeing the entertainment and the

sale of food and drink is merely incidental thereto, full First Amendment protection should apply and analogies to Blue Sky Laws are inappropriate.

The problem with applying the Derrington analysis is that,by its terms, the ordinance is not restricted to a regulation of nude entertainment which is merely a device to promote the sale of other products, presumably alcoholic beverages. Section 311.011 of the ordinance is directed to the prohibition of exposure of the private parts and female breasts in places where food and beverages are sold for consumption on the premises and conceivably, this provision of the ordinance could be construed to apply only where such exposure is incidental to the sale of the above named items. However, Section 311.021 applies by its terms to any public performance in any public place even when the performance itself is what attracts the audience. In short, Section 311.021 does not fit the mold of the ordinance which was approved in City of Portland v. Derrington, supra, and as such cannot be supported under the Derrington rationale.

Derrington is distinguishable on another ground. In Derrington the Portland ordinance prohibited the exposure of the female breast in any place where food or alcoholic beverage is offered for sale on the premises. It did not by its terms apply to entertainers as does the ordinance in the instant case. The court held the ordinance constitutional on its face, but did not reach the question of whether it could be constitutionally applied to a dancer or entertainer. By contrast, the ordinance involved in the instant proceedings is expressly and directly written as a restrictive regulation of entertainment.6/

Since the ordinance applied equally to all places where entertainers and per formers expose their breasts and private parts, not merely to those where the enter-

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6/ The California Supreme Court also relied upon Hoffman v. Carson, 250 S.2d 891 (Fla. 1971), cert. denied, in support of its opinion. In Hoffman, the Florida Supreme Court upheld the validity of an ordinance prohibiting nudity in public places by construing it to be an ordinance prohibiting indecent or lewd exposure, not merely nudity itself. It is thus not a valid precedent in this case.

tainment is incidental or a sales device, the justification used by the California Supreme Court is irrelevant and immaterial.

It might have been possible to construe the ordinance to be limited in its application to those places where the nude entertainment is incidental to the sale of other items of commerce. The California Supreme Court could have broadly construed the theatre exemption contained in Section 311.031 to preserve First Amendment rights by limiting the application of the ordinance to places where the entertainment is merely incidental to the business otherwise conducted. Instead, the California Supreme Court failed to treat the theatre exemption as being required by the First Amendment and failed also to broadly construe it. In the companion case, Glancy v. Sacramento, decided at the same time and in the same opinion, the California Supreme Court approved a theatre exemption which contained a restrictive definition of what a theatre was. That definition provided that:

> ". . . theatre, concert hall, or other similar establishment which is primarily devoted to theatrical per-

formances shall mean a building, playhouse, room, hall or other place having permanently affixed seats so arranged that a body of spectators can have an unobstructed view of the stage, upon which theatrical or vaudeville performances or similar forms of artistic expression are presented, and where such performances are not incidental to the promoting of the sale of food, drink or other merchandise, and for which a city license for a theatre is in full force and effect. . . ."

Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. at p. 687, fn.9, Appendix A, p. 6.

This definition is clearly restrictive in that it requires fixed seats, an unobstructed view of the stage from such seats, and the possession of a city theatre license. cf., Schact v. United States, 398 U.S. 58 (1970). It would preclude the exemption from being applied to many places where the performance is the principle offering of the premises, merely because

the premises lack a stage, fixed seats or, for whatever reason, a theatre permit. Such a narrow definition extends the ordinance's application beyond those premises where the entertainment is simply offered as a sales promotion device.

Although the Orange County ordinance involved in the instant case does not have a definition of what a theatre, concert hall, or similar establishment is, the court has clearly failed to construe such terms in the manner necessary to preserve the First Amendment rights of all places of public entertainment.

V.

ORANGE COUNTY ORDINANCE NO. 2356 IS NOT A VALID INCIDENTAL REGULATION OF SPEECH WITHIN THE TESTS SET FORTH IN UNITED STATES V. O'BRIEN

In the majority opinion of the California Supreme Court, the court assumed for the purposes of argument that Ordinance No. 2356 would have incidental impact on speech, and proceeded to apply the four

tests set forth in United States v. O'Brien. After doing so, the court found the ordinance still to be valid. We shall show that the court incorrectly applied those tests and that the ordinance cannot be sustained as a valid incidental regulation of speech.

In United States v. O'Brien, supra, the court set forth the test as follows:

> ". . . This court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the con-

stitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

United States v. O'Brien,
391 U.S. 367, 376-377.

As a prerequisite, then, the application of the O'Brien test demands a situation where a governmental regulation of conduct is applied to a situation where elements of speech and the regulated conduct are combined in the same acts. If such a prerequisite is met, the regulation of conduct will justify an incidental limitation on the exercise of the speech if the four tests are satisfied.

In grudgingly applying the O'Brien tests, the California Supreme Court said:

". . . We shall assume for the purpose of argument that there may

be some instances a 'Communicative element' in conduct falling within the instant ordinances sufficient to bring into play the First Amendment."

Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. at p. 695, Appendix A, p. 14.

It is clear, however, that such a combination will often occur in situations subjected to regulation under Ordinance No. 2356. That ordinance applies to all entertainment and public performances conducted in Orange County outside of theatres, concert halls, or similar establishments. It will apply to any play, ballet, or other public entertainment conducted outset the said locations and will, if valid, require the performers to be dressed in accordance with the provisions of the ordinance. Such a play, ballet, or other entertainment is of course conduct which, in most, if not all cases, will amount to speech within the meaning of the First Amendment. Thus, the applicability of the O'Brien test may not merely be assumed for the purposes of argument. It is a neces-

sary inquiry which is essential to the disposition of the case.

Applying O'Brien, the first question which must be answered is whether Ordinance No. 2356 is within the constitutional power of Orange County to enact. In affirming the existence of such power, the California Supreme Court characterized the ordinance as being a regulation of nudity in public. So characterized, the ordinance might be within the county's traditional police power. However, as we have observed above, the ordinance does not prohibit nudity but instead regulates the dress and attire of entertainers and performers. As such it is subject to different standards. As we have observed above, a regulation directed to the sexual nature of the entertainment cannot stand unless it fits the definition of obscenity. If that is indeed the case, then the instant ordinance does not come within the constitutional power of Orange County, since it fails to incorporate the constitutional definition of obscenity.

The second test is whether or not the regulation furthers an important or sub-

stantial governmental interest. For the purposes of this argument we shall assume that Orange County Ordinance No. 2356 may be properly characterized as a general prohibition of nudity in public places raising only the question of whether it may be incidentally applied to performers and entertainers. The majority's justification of the ordinance under this second test was as follows:

> "Second, it cannot be gainsaid that the regulations further 'an important or substantial governmental interest' (citation) in promoting public morals. It is our province to take note of public morality, not to dictate it. In this pluralistic society we cannot say that a 'topless' female or a 'bottomless' or nude person of either sex in a public place or place open to the public is 'socially commonplace' (citation) or has the support of a 'societal concensus' (citation). Indeed, the instant legislation conceivably gives some indication that such nude conduct is not in accord

with the mores of the people as a whole."

Crownover v. Musick, 9 Cal.3d___
107 Cal.Rptr. at pp. 695-696,
Appendix A, pp. 14-15.

The majority opinion fails to identify the governmental interests which are furthered by the ordinance. The only interests which may be inferred are the presumed interests of the government in prohibiting that which is not socially commonplace or which lacks a societal consensus. We would respectfully urge, to the contrary, that government in a pluralistic society has no business using the criminal law to enforce standards of morality which differ from individual to individual. Nor can such legislation be approved by the boot strap method used by the court: Its existence does not prove that it is needed.

Under the second O'Brien test, incidental restrictions on speech cannot be justified by just any exercise of the police power. The interest must be important or substantial. If these limitations are ignored, the O'Brien test would be reduced to nothing more than an application of

traditional due process analysis. The mere existence of a moral consensus opposed to topless entertainment would not satisfy these requirements.

The third test is whether or not the regulation is unrelated to the suppression of free expression. The majority opinion of the California Supreme Court so concluded on the theory it was aimed at conduct not at speech. We have already shown the invalidity of the court's reason as applied to Orange County Ordinance 2356, which is expressly directed at entertainment and at the attire and appearance of performers. Such a conclusion could be justified only on the assumption that the ordinance amounted to a general proscription of nudity - an assumption which we have already established to be inapplicable in this case.

The fourth test is whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. The majority concluded that it was not because the ordinances do not prohibit speech or expression. This amounts to a denial of

the fact that the ordinances do have an incidental effect on speech and expression protected by the First Amendment, the very assumption on which the court proceeded. The majority's justification is no justification at all. As we have alredy observed there will inevitably be numerous circumstances where the presentation of plays, ballets and other public entertainments are affected by the application of this ordinance. This is, by definition, an incidental restriction on speech. The majority opinion failed totally to face the question of whether the restriction was greater than necessary.

The ordinances involved here are far broader than necessary to further any substantial governmental interest involved. In supporting this point we can do no better than quote the dissenting opinion of Justice Tobriner:

> "The <u>fourth test</u> is that the law impose <u>no greater restriction than is essential</u> to the furtherance of an important or substantial governmental interest. This test requires us to identify the governmental in-

terest in question. If it is to prohibit nude entertainment, then the ordinances go further than necessary in banning the simulation of nudity; if it is to avoid neighborhood blight, they go further than needed in banning such entertainment regardless of location; if it is to eliminate the tawdry and vulgar, they go too far in banning all nude entertainment of whatever sophistication or refinement. Nowhere in the majority opinion can I discern a state interest which so closely parallels the ordinances that they could be said to proscribe no more than is necessary to further that interest.

"If compelled to describe the state's interest in regulating nude entertainment before voluntary adult audiences, I would be constrained to use antonyms of the terms set out in O'Brien; I would describe that interest as 'noncompelling', 'unimportant', 'insignificant', and 'dubious'. I would conclude that such

an interest does not justify any restriction upon protected expression."

Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. at p. 707, Appendix A, p. 26.

For these reasons the instant Orange County ordinance fails to meet the tests of United States v. O'Brien and it must be held unconstitutional.

VI

THE EXEMPTION GRANTED THEATRES, CONCERT HALLS, AND SIMILAR ESTABLISHMENTS IN ORDINANCE NO. 2356 DENIES PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

Although treated by the California Supreme Court as a general prohibition on nudity in public places, Ordinance No. 2356 does contain an exemption for performances given in theatres, concert halls, and similar establishments primarily devoted to theatrical performances. Petitioner Harvey Owen presents topless enter-

tainment in a bar licensed by the California Department of Alcoholic Beverage Control to sell liquor for consumption on the premises. We assume for the purposes of this argument that such premises do not fall within the theatre exemption.

We stress at the outset that under the California Supreme Court's majority opinion, the existence of the exemption is irrelevant to First Amendment issues. The underpinning of the majority opinion is that the First Amendment does not protect nudity in entertainment. Thus, the exemption granted to performances which take place in theatres, concert halls, and similar establishments does not embody any requirement that First Amendment protection be accorded such performances in such places. As indicated above, the court's approval of the restrictive definition of a theatre contained in the Sacramento ordinance indicates conclusively that the court does not conceive of the theatre exemption as embodying any First Amendment protections.

The California Supreme Court majority applied traditional Fourteenth Amendment tests of equal protection in sustaining the

theatre exemption against constitutional attack. It refused to apply the "suspect classification" test on the theory that First Amendment values were not impinged by the instant ordinance. However, such a conclusion is unjustified for the same reasons as we have already indicated in discussing the application of the O'Brien tests. Not only is the ordinance directed at speech on its face, but it is clear that it is generally applicable to the regulation of theatrical performances undertaken outside exempt locations.

The "compelling public purpose" test used to evaluate classifications of matters protected by the First Amendment is essentially equivalent to the tests set forth in United States v. O'Brien to evaluate incidental regulations of such matters. See Shapiro v. Thompson, 394 U.S. 618 (1969). The existence of theatrical productions which involve nudity or the exposure of the lower portion of the female breast in circumstances where such productions would be protected by the First Amendment is unquestionable. For a local government to rule that such performances

must take place only in edifices denominated a theatre or concert hall, or in other establishments which are regularly devoted to theatrical performances is to invidiously discriminate against those locations where theatrical performances are given only occasionally and against those locations which do not fit within the generic classification of theatre or concert hall. Such a classification is surely suspect since it arbitrarily fixes the locations where First Amendment rights may be exercised.

We can readily conceive that government has some right to control the location of theatrical productions involving nudity; it would appear to be unquestionable that government may prohibit such performances from taking place in public parks or on public streets. If the theatre exemption were to be broadly construed to permit nudity in non-obscene performances presented in enclosed premises it would serve rather than restrict First Amendment values. However, to permit the presentation of a performance protected by the First Amendment in a theatre

and to prohibit the same performance in a bar or other place open to the public merely because nudity is involved is to make an invidious discrimination that has not and cannot be justified by any compelling public purpose.

CONCLUSION

For the reasons stated herein, a Writ of Certiorari should issue.

Respectfully submitted,

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Attorneys for Petitioners

June CROWNOVER et al., Plaintiffs
and Respondents,

v.

James A. MUSICK, as Sheriff, etc.,
Defendant and Appellant.

Clarence REYNOLDS et al., Plaintiffs
and Appellants,

v.

CITY OF SACRAMENTO, Defendant
and Respondent.

Leonard L. GLANCY et al., Plaintiffs
and Appellants,

v.

COUNTY OF SACRAMENTO, Defendant
and Respondent.

Leonard L. GLANCY et al., Plaintiffs
and Appellants,

v.

The MUNICIPAL COURT FOR the SACRAMENTO JUDICIAL DISTRICT OF SACRAMENTO COUNTY, Defendant and Respondent;

The PEOPLE, Real Party in Interest
and Respondent.

L. A. 29917, Sac. 7904, Sac. 7905 and
Sac. 7906.

Supreme Court of California,
In Bank.

May 1, 1973.

SULLIVAN, Justice.

In these four cases, consolidated on appeal, we must determine the constitutionality of ordinances of the Counties of Orange and Sacramento and of the City of Sacramento which prohibit the service of food or drink and the providing of entertainment by so-called "topless" women and "bottomless" persons of either sex in any establishment, and also prohibit live acts and exhibitions by such persons in any public place or place open to the public or to public view, excepting in all instances theaters or similar establishments primarily devoted to theatrical performances. All of the ordinances in question were adopted pursuant to Penal Code sections 318.5[1] and 318.6,[2] which were added to the Penal Code in 1969.

In Crownover v. Musick (hereafter L.A. 29917) plaintiffs are owners and employees of Orange County establishments which serve food and alcoholic beverages and feature "topless" waitresses and "topless" and nude entertainers. Plaintiffs brought an action in the Orange County Superior Court for declaratory and injunctive relief attacking the constitutionality of Orange County Ordinance No. 2536 and asking that its enforcement be prohibited.[3] Ordi-

1. Section 318.5, which concerns the service of food and beverages, provides as follows: "Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a county or city, if such ordinance directly regulates the exposure of the genitals or buttocks of or the breasts of any person who acts as a waiter, waitress, or entertainer, whether or not the owner of the establishment in which the activity is performed employs or pays any compensation to such person to perform such activity, in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment.

"The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.

"This section shall be known and may be cited as the 'Quimby-Walsh Act.'"

2. Section 318.6, which concerns exposure in the course of "live acts" and exhibitions in public places, provides as follows: "Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county, if such ordinance relates to any live acts, demonstrations, or exhibitions which occur in public places, places open to the public, or places open to public view and involve the exposure of the private parts or buttocks of any participant or the breasts of any female participant, and if such ordinance prohibits an act or acts which are not expressly authorized or prohibited by this code.

"The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances."

3. Defendants were James A. Musick, Sheriff of Orange County, the State of

nance No. 2536 declares it to be a misdemeanor for a female to appear "topless" or for a person of either sex to appear "bottomless" (to use the common parlance) while serving food or beverages or while "participating in any live act, demonstration, or exhibition in any public place, place open to the public, or place open to public view." In addition, anyone who "permits, procures, counsels or assists" in such exposure is also guilty of a misdemeanor. However, the provisions of ordinance No. 2536 do not apply to a "theater, concert hall, or similar establishment which is primarily devoted to theatrical performances." The Orange County Board of Supervisors declared the ordinance "to be an urgency measure necessary for the immediate preservation of the public peace, health and safety," finding that the conduct prohibited therein was "so detrimental to the mental and moral state of the people of this County as to justify its immediate prohibition." [4]

California, and other persons identified by fictitious names. Defendant sheriff was the sole party appearing below and is the sole appellant before us.

4. Ordinance No. 2536 provides in pertinent part:

"SECTION 1. Division 11 is hereby added to Title 3 of the Codified Ordinances of the County of Orange to read as follows:

DIVISION 11
UNLAWFUL EXPOSURE OF PRIVATE PARTS AND FEMALE BREASTS
Article 1
Exposure by Waiters, Waitresses and Entertainers

Sec. 311.011. Prohibitions: Definitions: Waiters, Waitresses, Entertainers.

"Every person is guilty of a misdemeanor who, while acting as a waiter, waitress or entertainer in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment:

"(a) Exposes his or her genitals, pubic hair, buttocks, natal cleft, perineum, anal region or pubic hair region; or

"(b) Exposes any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, natal cleft, perineum, anal region or pubic hair region; or

"(c) Exposes any portion of the female breast at or below the areola thereof.

Sec. 311.012. Counseling or Assisting.

"Every person is guilty of a misdemeanor who causes, permits, procures, counsels or assists any person to expose or simulate exposure as prohibited in Section 311.011.

"Sec. 311.013. Employment or Payment Not Necessary for Offense.

"A person shall be deemed to be a waiter, waitress, or entertainer if such person acts in that capacity without regard to whether or not such person is paid any compensation by the management of the establishment in which the activity is performed.

Article 2
Exposure by Performers in Public

"Sec. 311.021. Prohibitions: Definitions: Public Performance.

"Every person is guilty of a misdemeanor who, while participating in any live act, demonstration, or exhibition in any public place, place open to the public, or place open to public view:

"(a) Exposes his or her genitals, pubic hair, buttocks, natal cleft, perineum, anal region, or pubic hair region; or

"(b) Exposes any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, natal cleft, perineum, anal region or pubic hair region; or

"(c) Exposes any portion of the female breast at or below the areola thereof.

"Sec. 311.022. Counseling or Assisting.

"Every person is guilty of a misdemeanor who causes, permits, procures, counsels or assists any person to expose or simulate exposure as prohibited in Section 311.021.

Article 3
Exemption of Theatrical Establishments

"Sec. 311.031. Exemption of Theatrical Establishments.

"The provisions of Article 1 and Article 2 of this Division shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.

"SECTION 2. This Ordinance is declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety, and shall become effective on this date. The facts constituting the emergency are as follows:

"The California State Legislature has adopted Chapters 1534 and 1535, Statutes of 1969, authorizing counties to adopt leg-

Plaintiffs alleged in substance that both the enabling statutes and the ordinances were unconstitutional on their face and as applied in that they constituted respectively an unlawful delegation and exercise of power; a prior restraint against activity protected by the First and Fourteenth Amendments to the United States Constitution and by article 1, section 9, of the California Constitution; an unlawful discrimination between establishments like those of plaintiffs and theaters in violation of the Equal Protection Clause of the Fourteenth Amendment; and a deprivation of property without due process of law.

After a hearing, the trial court granted a preliminary injunction prohibiting defendants from enforcing, or attempting to enforce, the ordinance and Penal Code sections 318.5 and 318.6, on the ground that they violated the equal protection clause of the United States Constitution and substantially equivalent provisions of the California Constitution (Cal.Const., art. I, §§ 11, 21; art. XX, § 18) and the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. The county and the sheriff appeal.

In Glancy v. County of Sacramento (hereafter Sac. 7905), plaintiff Leonard Glancy owns a Sacramento County Tavern where plaintiff Susanne Haines dances "topless" and "bottomless" and serves food and beverages "topless." Plaintiffs brought an action in the Sacramento County Superior Court for injunction and declaratory judgment against the threatened enforcement of two ordinances enacted by the County of Sacramento.[5] Ordinance No. 1054 (which bans "bottomless" activity)[6] and Ordinance No. 1055[7] (which bans "topless" activity)[7] taken together,

islation of the sort contained herein. Said legislation became effective November 10, 1969. This Board finds that the conduct prohibited herein is presently taking place within the unincorporated areas of this County and is so detrimental to the mental and moral state of the people of this County as to justify its immediate prohibition."

5. The County of Sacramento is the sole defendant.

6. Ordinance No. 1054 provides in pertinent part:

"Section 1. *Legislative Authorization.* This ordinance is adopted pursuant to Sections 318.5 and 318.6 of the Penal Code. All words used in this ordinance which also are used in the said Sections 318.5 and 318.6, are used in the same sense and mean the same as the same respective words used in the said Sections 318.5 and 318.6 of the Penal Code.

"Section 2. *Theater-Definition.* As used in this ordinance and in Sections 318.5 and 318.6, 'theater' means a building, play house, room, hall or other place having a permanent stage upon which movable scenery and theatrical or vaudeville or similar performances are given and permanently affixed seats so arranged that a body of spectators can have an unobstructed view of the stage, and for which a county license for a theater is in full force and effect. This definition does not supersede the provisions of Section 1 of this ordinance.

"Section 3. *Prohibition.* Every person is guilty of a misdemeanor who:

"(a) Exposes his or her private parts or buttocks or employs any device or covering which is intended to simulate the private parts or pubic hair while participating in any live act, demonstration, or exhibition in any public place, place open to the public, or place open to public view, or while serving food or drink or both to any customer, or

"(b) Permits, procures or assists any person to so expose himself or herself, or to employ any such device.

"Section 4. *Accessories.* Every person is guilty of a misdemeanor who permits, counsels, or assists any person to violate any provision of this ordinance.

"Section 5. *Exceptions.* This ordinance does not apply to:

"(a) A theater, concert hall, or similar establishment which is primarily devoted to theatrical performance.

"(b) Any act authorized or prohibited by any state statute.

"Section 6. *Constitutionality.* If any provision or clause of this ordinance or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable."

7. Ordinance No. 1055 duplicates sections 1, 2, 4, 5, and 6 of the "bottomless" ordi-

are essentially the same as in the Orange County Ordinance. (See fn. 4, *ante*.) The differences in wording concern only immaterial variances in anatomical description. The complaint challenged the constitutionality of the Sacramento County ordinances on substantially the same grounds as those asserted in L.A. 29917. The trial court denied plaintiffs' request for a preliminary injunction in its entirety and dissolved a previously issued temporary restraining order. Plaintiffs appeal.

In Glancy v. Municipal Court (hereafter Sac. 7906), Glancy and Haines petitioned the Sacramento County Superior Court for a writ of prohibition to halt criminal proceedings brought against them in the Sacramento Municipal Court for alleged violation of ordinances Nos. 1054 and 1055. Petitioners had been charged with misdemeanors two days after the superior court had denied an injunction in Sac. 7905. Their petition, which asserted the same grounds for relief as the civil complaint in Sac. 7905, was denied. Glancy and Haines appeal from that denial. We have decided that their appeal in Sac. 7906 must be dismissed as moot, since we have been advised that on June 1, 1971, all underlying criminal charges which remained against them were dismissed on motion of the district attorney. In view of the dismissal of the charges it is evident that there is no "'actual controversy' upon which a judgment [of prohibition] could operate," nor is there any "'effectual relief'" to be granted to petitioners. (Paul v. Milk Depots, Inc. (1961) 62 Cal.2d 129, 132, 41 Cal.Rptr. 468, 396 P.2d 924; Consolidated Vultee Aircraft Corp. v. United Auto. etc. Workers (1946) 27 Cal.2d 859, 863, 167 P.2d 725.)

Nevertheless, the constitutionality of ordinances Nos. 1054 and 1055 is still before us, as a result of the appeal in Sac. 7905 from the order denying declaratory and injunctive relief. Otherwise plaintiffs could not obtain a final judicial determination of the issues they have raised without defending against another criminal prosecution which clearly might be brought as a result of another evening's performance. (See Zeitlin v. Arneberg (1963) 59 Cal.2d 901, 905-906, 31 Cal.Rptr. 800, 383 P.2d 152.) Our dismissal for mootness of the appeal in Sac. 7906 of course does not preclude our consideration of these issues as they are raised in Sac. 7905.

In Reynolds v. City of Sacramento (hereafter Sac. 7904), plaintiff Clarence Reynolds owns and operates a tavern in the City of Sacramento at which plaintiffs Kathleen Rose Gaines and Marsha Gean McNabb, his employees, serve food and beverages "topless" and dance "topless" and "bottomless." Plaintiffs brought an action in the Sacramento County Superior Court for injunction and declaratory judgment against alleged threatened enforcement of an ordinance enacted by the *City* of Sacramento.[8] This ordinance (No. 2856, fourth series) became effective concurrently with county ordinances Nos. 1054 and 1055; it combines into one enactment the equivalent

nance, and otherwise provides in pertinent part:

"Section 3. *Prohibition.* Every female is guilty of a misdemeanor who while participating in any live act, demonstration, or exhibition in any public place, place open to the public, or place open to public view, or while serving food or drink or both to any customer:

"(a) Exposes any portion of either breast below a straight line so drawn that both nipples and all portions of both breasts which have a different pigmentation than that of the main portion of the breasts are below such straight line, or

"(b) Employs any device or covering, which is intended to simulate such portions of the breast, or

"(c) Wears any type of clothing so that any portion of such part of the breast may be observed."

Ordinances Nos. 1054 and 1055 appear as chapters 9.44 and 9.48, respectively, of the Sacramento County Code (with insignificant variations in form).

8. The sole defendant is the City of Sacramento.

of the county's "topless" and "bottomless" provisions. Its operative portions are substantially identical to the provisions of the two county ordinances taken together, except that "Legislative Findings" of the city council are added which declare essentially that an "increasing trend" toward the proscribed acts in Sacramento is "adverse to the public peace, morals and good order" and, therefore, justifies the city's restrictions.[9] Plaintiffs' complaint challenged the city ordinance on constitutional

9. The city ordinance which added sections 26.50 through 26.64 to the city code provides in relevant part (with immaterial variation in codified form):

"SECTION 1. Sections 26.50 through 26.64 inclusive are added to the Sacramento City Code to read as follows:

"Sec. 26.50. *Legislative Findings and Authorization.*

"The City Council does hereby find that there exists in this city an increasing trend toward nude and semi-nude acts, exhibitions and entertainment, and of undress by female employees of food, drink and like establishments serving the public, and that such acts and such competitive commercial exploitation of nudity is adverse to the public peace, morals and good order; and that it is in the best interest of the public safety and convenience of this city to restrict such nudity, and the commercial promotion and exploitation thereof, as hereinafter set forth.

"All words used in these City Code Sections which are also used in Sections 318.5 and 318.6 of the Penal Code are used in the same sense and mean the same as the same respective words used in Sections 318.5 and 318.6 of the Penal Code.

"Sec. 26.60. *Same—Theater—Definitions.*

"As used in Sections 26.61 through 26.64 inclusive and in Sections 318.5 and 318.6 of the Penal Code the phrase 'theater, concert hall, or other similar establishment which is primarily devoted to theatrical performances' shall mean a building, playhouse, room, hall or other place having permanently affixed seats so arranged that a body of spectators can have an unobstructed view of the stage, upon which theatrical or vaudeville performances or similar forms of artistic expression are presented, and where such performances are not incidental to the promoting of the sale of food, drink or other merchandise, and for which a city license for a theater is in full force and effect. This definition does not supersede the provisions of Section 26.50 of this code.

"Sec. 26.61 *Prohibition Against the Display of Female Breasts.*

"Every female is guilty of a misdemeanor who, while participating in any live act, demonstration, or exhibition in any public place, place open to the public, or place open to public view, or while serving food or drink or both to any customer;

"a. exposes any portion of either breast below a straight line so drawn that both nipples and all portions of both breasts which have a different pigmentation than that of the main portion of the breasts are below such straight line, or

"b. employs any device or covering, which is intended to simulate such portions of the breast, or

"c. wears any type of clothing so that any portion of such part of the breast may be observed.

"Sec. 26.62. *Prohibition Against Display of Private Parts.*

"Every person is guilty of a misdemeanor who exposes his or her private parts or buttocks, or employs any device or covering which is intended to simulate the private parts or pubic hair of such person, while participating in any live act, demonstration, or exhibition in any public place, place open to the public, or place open to public view, or while serving food or drink or both to any customer.

"Sec. 26.63. *Same—Accessories.*

"Every person is guilty of a misdemeanor who permits, procures, counsels, or assists any person to violate any provision of Sections 26.61 or 26.62 of this Code.

"Sec. 26.64. *Same—Exceptions.*

"Sections 26.61 through 26.63 inclusive of this Code do not apply to:

"a. A theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.

"b. Any act authorized or prohibited by any state statute.

"SECTION 2. This ordinance is hereby declared to be an emergency measure to take effect on November 20, 1969, the reason for said emergency being that the County of Sacramento has adopted a similar ordinance which shall become ef-

grounds identical to those alleged by Glancy and Haines in their attack on the county ordinances in Sac. 7805. After a hearing,[10] the trial court denied a preliminary injunction and dissolved a previously issued temporary restraining order. Plaintiffs appeal.

Having concluded that the appeal in Sac. 7805 should be dismissed as moot, we will confine ourselves to the issues raised in the remaining three cases. Since the issues are essentially the same in all three, we shall refer to all plaintiffs and all defendants of the three cases as a group.

I

So that we may focus on the precise issues confronting us, we make some preliminary observations.

[1] First, although all plaintiffs have launched constitutional attacks on the local ordinances, plaintiffs in L.A. 29017 have in addition extended these attacks to Penal Code sections 318.5 and 318.6. The thrust of the attacks seems to be that these statutes in some way effectuated the adoption of the local ordinances. Such is obviously not the case. Section 318.5 (see fn. 1, *ante*) merely permits cities and counties to regulate the "topless" or "bottomless" exposure of waiters, waitresses and entertainers in establishments serving food and drink except theaters and similar establishments. Section 318.6 (see fn. 2, *ante*) similarly permits the regulation of "topless" or "bottomless" exposure in relation to "live acts, demonstrations or exhibitions" in public places or places open to the public, except theaters and similar establishments. These statutes perform no active role in the adoption of the designated kind of ordinance; they merely permit cities and counties to adopt such an ordinance if they so desire. The Legislature has expressly evidenced in each statute its intent to permit local regulation of the conduct therein described (see In re Cox (1970) 3 Cal.3d 205, 230, 90 Cal.Rptr. 24, 474 P.2d 992; Pipoly v. Benson (1942) 20 Cal.2d 366, 371-372, 125 P.2d 482) insofar as any such regulation might have otherwise invaded a field previously held to have been preempted by the state. (See In re Lane (1962) 58 Cal.2d 99, 102-105, 22 Cal.Rptr. 857, 372 P.2d 897; In re Moss (1962) 58 Cal.2d 117, 119, 23 Cal.Rptr. 361, 373 P.2d 425.)

[2] Neither do Penal Code sections 318.5 and 318.6 nor the instant ordinances authorized by such sections conflict with article XX, section 22 of the California Constitution which vests in the Department of Alcoholic Beverage Control "the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State . . . ."

Several Courts of Appeal have reasoned that similar local ordinances may properly regulate live entertainment in taverns, while the department's jurisdiction remained intact to license the sale of alcoholic beverages. These courts decided that the two types of regulation were independent and distinct, and therefore ordinances relating to the subject of live entertainment did not conflict with the department's powers over the sale of alcohol. (Cristmat, Inc. v. County of Los Angeles (1971) 15 Cal.App.3d 590, 93 Cal.Rptr. 325; Carolina Lanes, Inc. v. City of Los Angeles (1967) 253 Cal.App.2d 831, 61 Cal.Rptr. 630; Robins v. County of Los Angeles (1966) 248 Cal.App.2d 1, 56 Cal.Rptr. 853; Daniel v. Board of Police Commissioners (1961) 190 Cal.App.2d 566, 12 Cal.Rptr. 225, disapproved on other grounds in Burton v. Municipal Court (1968) 68 Cal.2d 684, 693, 68 Cal.Rptr. 721, 441 P.2d 281.) As the *Daniel* court noted, "[The ordinance] applies to any such establishment regardless of whether it is in the liquor

fective on November 20, 1969, and it is desirable [*sic*] that the City and County ordinances on this subject become effective on the same date".

10. The Sacramento Superior Court consolidated the Reynolds and Glancy actions for hearing.

business. A denial of a liquor licensee's application for a permit to have 'live' entertainment in his liquor establishment would not affect his right under his liquor license to sell liquor." (Daniel v. Board of Police Commissioners, *supra*, 190 Cal.App.2d at p. 571, 12 Cal.Rptr. at p. 229.)

[3, 4] All the above cases, except *Cristman*, dealt with licensing ordinances, rather than provisions which, like those in the cases at bench, are penal in nature. We think that the reasoning of *Daniel* and its successors applies with even stronger force to exclusively penal local ordinances, since article XX, section 22 does not reserve to the department, nor to the State of California, exclusive power with respect to criminal acts occurring on licensed premises. Although the state has preempted the field of criminal aspects of intoxication (Pen.Code, § 647, subd. (f); People v. Lopez (1963) 59 Cal.2d 653, 30 Cal.Rptr. 813, 381 P.2d 637; In re Zorn (1963) 59 Cal.2d 650, 30 Cal.Rptr. 811, 381 P.2d 635), localities may still regulate, within constitutional limits, other nonpreempted acts on licensed and nonlicensed premises. While all the above cases, except *Robins*, dealt with entertainment or activities other than waiting on table, we find that ordinances regulating the service of food or beverages likewise do not conflict with the department's jurisdiction. Regulation by the state of the nudity of those serving food or drinks is a subject distinct from the regulation of the sale of those drinks. Local regulation pursuant to the authorization of state statutes of the state of dress of waiters, waitresses or entertainers in establishments serving food or beverages does not per se conflict with the power of the department to license and regulate the manufacture, sale, purchase, possession or transportation of alcoholic beverages.

Second, the various ordinances involved in the cases at bench (see fns. 4, 6, 7 and 9, *ante*) follow closely the essential wording of the statutes and by their language conform in scope to the designated regulatory area over which the state has yielded its preemptive claims. Thus the ordinances directly regulate conduct within the delineated statutory limits. They proscribe specific behavior (i. e., "topless" or "bottomless" exposure) by particular persons in designated establishments other than theaters. They do not expressly prohibit speech.

Third, the ordinances are directed at conduct, not words or speech. The ordinances do not involve a prohibition resting "squarely upon [the] exercise of the 'freedom of speech'" (Cohen v. California (1971) 403 U.S. 15, 19, 91 S.Ct. 1780, 1785, 29 L.Ed.2d 284); nor do they restrict a particular form of speech considered outside the scope of constitutional protection. (See Roth v. United States (1957) 354 U.S. 476, 481, 483–485, 77 S.Ct. 1304, 1 L.Ed.2d 1498; Chaplinsky v. New Hampshire (1941) 315 U.S. 568, 571–572, 62 S.Ct. 766, 86 L.Ed. 1031.) We are not presented with the problems raised in obscenity cases.

II

As previously indicated, plaintiffs contend that the respective ordinances are unconstitutional on their face and as applied, in that they infringe upon the rights of freedom of speech and expression guaranteed by the First and Fourteenth Amendments to the United States Constitution and by article I, section 9 of the California Constitution.

In essence, plaintiffs' argument runs as follows: that the ordinances are directed to the prohibition of public nude entertainment; that since entertainment is communicative, it is a form of speech so that the ordinances prohibit speech; that "topless" waitresses, as well as "topless" or "bottomless" dancers are entertainment; that since nude entertainment cannot be prohibited unless it is obscene, the ordinances are unconstitutionally overbroad because they prohibit non-obscene speech; and that, even assuming the prohibition of non-obscene nude entertainment is merely incidental to the purposes of the ordinances,

they are nevertheless unconstitutional because they fail to fulfill a compelling public purpose. The position of defendants, on the other hand, is that the ordinances are directed toward the legitimate regulation of conduct rather than the prohibition of speech and therefore constitute a valid exercise of the police power.

Our resolution of this dispute requires us to examine the relationship between speech and conduct and to consider the principles which have been developed, particularly by the United States Supreme Court, in regard to symbolic conduct. Although it has been said that there is no constitutional distinction between speech and conduct [11] the high court has refused to accept the view that all conduct is to be deemed speech merely because it was intended to be communicative in some way. (See United States v. O'Brien (1968) 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672) As will appear the court has separately conceptualized "speech" and conduct and in a variety of contexts has made an accommodation between them.

[5] Freedom of speech is not an absolute. (Konigsberg v. State Bar (1961) 366 U.S. 36, 49, 81 S.Ct. 997, 6 L.Ed.2d 105; Roth v. United States, *supra*, 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498; Schenck v. United States (1919) 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470.) [12] In *Konigsberg*, the court explained this principle: "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. [Fn. omitted.] [Citations.] On the other hand, general regulatory statutes, *not intended to control the content of speech* but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment[s] forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved *a weighing of the governmental interest involved.* [Citations.]" (Konigsberg v. State Bar, *supra*, 366 U.S. 36, 49-51, 81 S.Ct. 997, 1006, 6 L.Ed.2d 105, italics added.) More recently in Cohen v. California, the court reiterated that "the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses." (Cohen v. California (1971) 403 U.S. 15, 19, 91 S.Ct. 1780, 1785, 29 L.Ed.2d 284.)

[6] These general principles governing "pure" speech are *a fortiori* applicable to conduct mixed with speech—symbolic conduct or nonverbal expression as some writers have designated it (see generally Note: Symbolic Conduct (1968) 68 Colum.L.Rev. 1091.) Two additional competing principles emerge: First, some conduct which is expressive or communicative may be entitled to First Amendment protection (Tinker v. Des Moines School Dist. (1969) 393 U.S. 503, 505-506, 89 S.Ct. 733, 21 L.Ed.2d 731); second, "certain forms of conduct mixed with speech may be regulated or prohibited." (Cox v. Louisiana (II) (1965) 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d 487; see also United States v. O'Brien (1968) 391 U.S. 367, 376-377, 88 S.Ct. 1673, 20 L.Ed.2d 672.) But although the principles compete, they have neither equal standing nor equal value. Reluctant to give symbolic conduct the same degree of First Amendment protection as pure speech, the Supreme Court declared in Cox

11. "A constitutional distinction between speech and conduct is specious. Speech *is* conduct, and actions speak." (Henkin, The Supreme Court, 1967 Term—Foreword: on Drawing Lines (1968) 82 Harv.L.Rev. 63, 79, original italics.)

12. Immortally illustrated by Mr. Justice Holmes in *Schenck*: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." (249 U.S. at p. 52, 39 S.Ct. at p. 249.)

v. Louisiana (1) (1965) 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471: "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

Thus the court has used a balancing test with different weights thrown into the scales. As one writer has expressed it: "One would expect, then, that in discussing symbolic speech the courts would be careful to establish criteria for identifying conduct which has communicative value and for which first amendment protection is required. [Fn. omitted.] Such, however, has not been the case. The courts have instead substituted for a refined definition of symbolic speech a balancing process weighted in favor of state interest and applied indiscriminately to all conduct arguably related to speech. [Fn. omitted.]" (Note, Symbolic Conduct, *supra*, 68 Colum.L.Rev. 1091, 1092.)

Applying this balancing test, the high court has afforded First Amendment protection to conduct which was in essence "speech" or "words" or "public utterance," albeit scurrilous and offensive (Cohen v. California, *supra*, 403 U.S. 15, 22-25, 91 S.Ct. 1780, 29 L.Ed.2d 284) or which was "closely akin to 'pure speech' " while being neither actually nor potentially disruptive. (Tinker v. Des Moines School Dist., *supra*, 393 U.S. 503, 505-506, 89 S.Ct. 733, 21 L.Ed.2d 731.) In *Cohen*, the court reversed the conviction for disturbing the peace (Pen.Code, § 415) of an anti-war protestor who in the corridor of the Los Angeles County Courthouse wore a jacket bearing a statement against the draft using a "four-letter" word. Writing for the court, Justice Harlan observed: "The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech,' cf. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself." (Cohen v. California, *supra*, 403 U.S. 15, 18, 91 S.Ct. 1780, 1784, 29 L.Ed.2d 284, original italics.) In *Tinker* the court held that the wearing of black armbands by public school pupils to protest the United States' policy in Vietnam "in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was *closely akin to 'pure speech'* which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. Cf. Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966)." (Tinker v. Des Moines School Dist., *supra*, 393 U.S. 503, 505-506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, italics added.)

Similarly in Brown v. Louisiana (1966) 383 U.S. 131, 142, 86 S.Ct. 719, 724, 15 L.Ed.2d 637, a silent sit-in in a public library to protest its segregated facilities was deemed protected because "[First Amendment] rights are not confined to verbal expression. They embrace *appropriate types of action which certainly include* the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities. [Fn. omitted.]" (Italics added.) (See also Garner v. Louisiana (1961) 368 U.S. 157, 201, 82 S.Ct. 248, 271, 7 L.Ed.2d 207 (Harlan, J., concurring) (sit-in at segregated lunch counter was "as much a part of the *'free trade in ideas,'* [citation] as is verbal expression, more commonly thought of as 'speech' ") (italics added).)

The high court has also held the display of a red flag, as a symbol of opposition to organized government, could not be constitutionally prohibited (Stromberg v. California (1931) 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117); and that a state requirement that school children salute the flag and recite the pledge of allegiance unconstitutionally abridged First Amendment freedoms of speech and religion (Board of Education v. Barnette (1943) 319 U.S. 624, 632-634, 63 S.Ct. 1178, 87 L.Ed. 1628). Speaking for the court in *Barnette*, Justice Jackson remarked: "There is no doubt that, in connection with the pledges, the flag salute is a *form of utterance. Symbolism is a primitive but effective way of communicating ideas.* The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. . . . Symbols of State often convey political ideas just as religious symbols come to convey theological ones. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." (*Id.* at pp. 632-633, 63 S.Ct. at p. 1182, italics added.)

On the other hand, as has been noted, the Supreme Court has applied the First Amendment balancing test so as to *permit* the regulation of certain conduct which was not protected merely because it expressed an idea. In Cox v. Louisiana (I), *supra*, 379 U.S. 536, 554-555, 85 S.Ct. 453, 13 L.Ed.2d 471, although reversing on other grounds a conviction under a Louisiana statute prohibiting the obstruction of public passages, the court nevertheless rejected a contention that the statute was unconstitutional on its face: "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." (*Id.* at p. 554, 85 S.Ct. at p. 464.) Similarly, in upholding the narrowly drawn statute at issue in Cox v. Louisiana (II), *supra*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (picketing or parading near courthouse with specific intent to obstruct justice), the court commented: "Nor does such a statute infringe upon the constitutionally protected rights of free speech and free assembly. The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited." (*Id.* at p. 563, 85 S.Ct. at p. 480.)

The high court's balancing analysis of activity which arguably contains both "speech" and "nonspeech" elements has been most fully set forth in United States v. O'Brien, *supra*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672. In that case the defendant publicly burned his selective service registration certificate and was convicted under a federal statute prohibiting its knowing destruction or mutilation. The court rejected his contention that the statute was unconstitutional because his act, committed in order to protest the war in Vietnam, was protected "symbolic speech" within the First Amendment. The court said at pages 376-377, 88 S.Ct. at pages 1678, 1679: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating;

paramount; cogent; strong. [Fns. omitted.] Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." [13]

A

Persons serving food and beverages

Mindful of the above principles, we first turn to consider those provisions of the ordinances which prohibit the serving of food and beverages by "topless" or "bottomless" waitresses or "bottomless" waiters. The issue need not detain us long since it is obvious that these parts of the ordinances regulate conduct and do not affect in any way the exercise of freedom of speech or expression.

[7] The service of food and beverages is a commercial activity. It entails nothing of a communicative nature in the constitutional sense. Nothing about it calls for the protection given speech in order "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (Roth v. United States, *supra*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498.) This ordinary business activity is not transformed nor elevated into constitutionally protected speech or expression merely because the waiter or waitress is unclothed. Such business conduct does not become "symbolic" and thus "communicative" in the constitutional sense because it occurs in "topless" or "bottomless" fashion. Such nude activity is nothing more than a commercial exhibition designed to stimulate the customer and promote sales.

[8] On the contrary, these regulatory provisions are a proper exercise of the police power. Almost 50 years ago in Miller v. Board of Public Works (1925) 195 Cal. 477, 490, 234 P. 381, 385, this court noted that a "large discretion is vested in the legislative branch of the government with reference to the exercise of the police power." We also said that "as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation. [Citation.]"

The prohibitions on "bottomless" waiters and waitresses and on "topless" waitresses may rationally be justified by at least two of the above four legitimate state purposes. Orange County Ordinance No. 2536 essentially states all four grounds. (§ 2, see fn. 4, *ante*.) Ordinance No. 2856, fourth series of the City of Sacramento, refers to all but public health. (§ 26.59; see fn. 9, *ante*.) Only Sacramento County Ordinance Nos. 1054 and 1055 (see fns. 6 and 7, *ante*) make no explicit findings, but any or all of the four above purposes may be implied. At least two of these four contentions—public morals and public welfare—may conceivably justify the prohibitions. "Topless" waitresses, who mingle with customers, may stimulate breaches of the peace amongst a bar's largely male clientele. Tawdry establishments featuring nudity as a commercial exhibition and sales promotion may be detrimental to the general welfare of the surrounding community. Finally it is important to bear in mind that

13. In explanation of the quality of the governmental interest, the court cited NAACP v. Button (1963) 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405; Sherbert v. Verner (1963) 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965; NAACP v. Alabama ex rel. Patterson (1958) 357 U.S. 449, 464, 78 S.Ct. 1163, 2 L.Ed.2d 1488; Bates v. Little Rock (1960) 361 U.S. 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480; Thomas v. Collins (1945) 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430.)

the ordinances do not proscribe the service of food and drink but only regulate the *manner* in which the service is conducted.

B

Entertainers and performers

As previously noted, the ordinances before us generally prohibit "topless" exposure by females and "bottomless" exposure by every person of either sex while participating in any "live act, demonstration or exhibition" in any public place or by entertainers in establishments serving food or beverages, excepting in all instances theaters and similar establishments. None of the ordinances prohibit "topless" exposure by *males* (see fns. 4, 6, 7, and 9, *ante*). No constitutional attack has been directed against them based on male "toplessness" since obviously it has not been forbidden. Any attempt to fashion a constitutional argument on male "toplessness" out of the provisions of the enabling statutes (see fns. 1 and 2, *ante*) must also fail for two reasons. First, as we have explained (see Part I, *ante*) the statutes themselves prescribe no regulation but merely permit local regulation in a field which may have been preempted by the state. Even if we assume for the sake of argument that the underlying statutes permit local regulation of male "toplessness," the fact is that the ordinances here involved have not done so. Second, we note that whereas Penal Code section 318.5 (see fn. 1, *ante*) permits local regulation of "the exposure of the genitals or buttocks of or the breasts of *any person* who acts as a waiter, waitress or entertainer in establishments serving food and beverages," (italics added) section 318.6 (see fn. 2, *ante*) permits local regulation by ordinance which "relates to any live acts . . . which occur in public places . . . and involve the exposure of the private parts or buttocks of any participant or the breasts of any *female* participant." (Italics added.) We can well understand a legislative concern as to persons serving food and drink which rests on hygienic reasons. Because of the collective phrasing of the provisions in section 318.5, one can conjure up desperate and strained criticism—content to behold the mote in the eye—arguing that section 318.5 interdicts male toplessness in entertainers while section 318.6 does not similarly treat male participants. If the point ever became a live issue, we think that the two sections obviously enacted in tandem may be fairly read as permitting regulation of exposure of only the female breasts of the entertainer or participant as the case may be so as to preserve section 318.5 from even this hypertechnical claim of unconstitutionality. (See San Francisco Unified School Dist. v. Johnson (1971) 3 Cal.3d 937, 92 Cal. Rptr. 309, 479 P.2d 669; In re Cox, *supra*, 3 Cal.3d 205, 223, 90 Cal.Rptr. 24, 474 P.2d 992; In re Kay (1970) 1 Cal.3d 930, 942–943, 83 Cal.Rptr. 686, 464 P.2d 142.) But, of course, the point is not at issue since no male toplessness has in fact been forbidden.

It is clear that these provisions of the ordinances are directed at conduct—topless and bottomless exposure—and not at speech or at conduct which is "in essence" speech or "closely akin to speech." A common sense construction (see People v. Davis (1968) 68 Cal.2d 481, 483, 67 Cal. Rptr. 547, 439 P.2d 651) of the pertinent provisions is that they proscribe nudity in specified public places. They do not prohibit entertainment but merely enjoin that if the entertainer or performer offers it, he or she must have some clothes on. In a word the ordinances regulate conduct.

Is such conduct symbolic in the constitutional sense? Is this nudity in bars and other specified places open to the public so inherently communicative by nature as to call for the protection given the "interchange of ideas . . . . [¶] [a]ll ideas have even the slightest redeeming social importance" (Roth v. United States, *supra*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498)? The questions seem to provide their own negative answers. Unless we wish to blind ourselves to what is happening in big cities with their "topless" and "bottomless" bars and

"nude live acts" in a tawdry atmosphere that blights the neighborhood if not the entire community, it is common knowledge that such conduct is nothing more than a sales gimmick. It is delusive to speculate in the face of these realities that the entertainment in this milieu will acquire protectible communicative properties by exposure of the genitals, pubic area or female breasts of the performers. *Assuming* arguendo that there may ensue in instances an expression which is communicative in the constitutional sense, we do not think it is unreasonable to regulate the *form*, or *manner* of the communication.

In City of Portland v. Derrington (1969) 253 Or. 289, 451 P.2d 111, the Supreme Court of Oregon upheld the constitutionality of an ordinance which provided: "'It is unlawful for any female person to appear or be in a place where food or alcoholic beverage is offered for sale for consumption on the premises, so costumed or dressed that one or both breasts are wholly or substantially exposed to public view.'" (*Id.* at p. 112, 253 Or. at p. 291.) It was there said "In cases of this kind, the court must look to the substance of the regulation and ask whether the elements of communication which may be present in the regulated conduct are significant enough to bring the entire course of conduct under the protection of the First Amendment. [Citation.]" (*Id.* at p. 113, 253 Or. at p. 292.) The court continued: "Whether or not we agree with the wisdom of the city council's attempt to legislate morals, the question is not one of legislative wisdom, but one of constitutional power. The chief aim of the ordinance is to regulate conduct deemed by the lawmakers to be injurious to health, safety, and morals. The city's legislative judgment in the matter should be upheld unless the statute unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct. We do not believe the interference with communication in the case at bar has enough substance to present a First Amendment question. The error in the court below was in treating the problem as one of free speech and nothing more." (*Id.* at pp. 113–114, 253 Or. at p. 293) (See also Hoffman v. Carson (Fla. 1971) 250 So. 891, 892, in which the Supreme Court of Florida upheld against claims by a cocktail bar "go-go" dancer that an ordinance prohibiting "any persons to expose or exhibit his sexual organs in any public place" was unconstitutional on its face and as applied.)

Nevertheless, following the approach of the United States Supreme Court in United States v. O'Brien, *supra*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, we shall assume for the purpose of argument that there may be in some instances a "communicative element" in conduct falling within the instant ordinances sufficient to bring into play the First Amendment. On this assumption, we shall proceed to determine according to the fourfold test announced in *O'Brien* [14] whether such conduct is constitutionally protected activity.

First, it cannot be doubted that the governmental entities in the instant cases have the inherent constitutional power to regulate nude conduct in bars, restaurants and other public places.' It is clear that such regulations are justified by considerations of public morals and general welfare (see Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal.2d 515, 522, 20 Cal.Rptr. 638, 370 P.2d 342; Miller v. Board of Public Works, *supra*, 195 Cal. 477, 490, 234 P. 381) to mention two, and the very elasticity of the police power gives it the capacity to meet the reasonable current requirements of a changing world. (Consolidated Rock Products Co. v. City of Los Angeles, *supra*, 57 Cal.2d 515, 521–522, 20 Cal.Rptr. 638, 370 P.2d 342.)

Second, it cannot be gainsaid that the regulations further "an important or substantial governmental interest" (United States v. O'Brien, *supra*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672) in

14. See text accompanying footnote 13, *ante*.

promoting public morals. It is our province to take note of public morality, not to dictate it. In this pluralistic society we cannot say that a "topless" female or a "bottomless" or nude person of either sex in a public place or place open to the public is "socially commonplace" (Robins v. County of Los Angeles (1966) 248 Cal. App.2d 1, 11, 56 Cal.Rptr. 853) or has the support of a "societal consensus" (Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 102, 84 Cal.Rptr. 113, 465 P.2d 1). Indeed, the instant legislation conceivably gives some indication that such nude conduct is not in accord with the *mores* of the people as a whole.

Third, it is also clear that this governmental interest in regulating nude conduct is "unrelated to the suppression of free expression . . . ." (United States v. O'Brien, *supra*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672.) The regulation is aimed at conduct, not speech; at "separately identifiable conduct" (Cohen v. California, *supra*, 403 U.S. 15, 18, 91 S.Ct. 1780, 29 L.Ed.2d 284), not at an activity "entirely divorced from actually or potentially disruptive conduct . . . ." (Tinker v. Des Moines School Dist., *supra*, 393 U.S. 503, 505, 89 S.Ct. 733, 736, 21 L.Ed.2d 731.)

Fourth, if the ordinances impose any incidental restriction on First Amendment freedom of speech and expression (and we doubt that they do) it is certainly "no greater than is essential to the furtherance of [an important or substantial governmental] interest." (United States v. O'Brien, *supra*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672.) The ordinances do not *prohibit* speech or expression or entertainment; they merely direct that the entertainer cannot appear with genitals or breasts exposed. The ordinances proscribe no more than is necessary to ban the nudity which has been deemed harmful to public welfare or morals.

We are satisfied therefore that, upon the *assumption* made of some communicative element in the conduct here under discussion, the ordinances before us meet all of the four requirements set down by the Supreme Court in the *O'Brien* case.[15]

[9] We, therefore, conclude that the ordinances on their face do not infringe upon the rights of freedom of speech or expression but are valid regulations of conduct. In light of this conclusion we reject plaintiffs' contention that the ordinances are unconstitutionally broad.[16]

15. The recent Supreme Court opinion in California v. LaRue (1972) 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, which upheld the state's broad power under the Twenty-First Amendment to regulate live "sexual" entertainment in establishments which serve liquor is not applicable to this case. The only language in the opinion potentially applicable to the instant matter involved regulation of motion pictures as well as live entertainment and thus is distinguishable, since the ordinances herein do not regulate motion pictures. "The substance of the regulations struck down prohibit licensed bars or nightclubs from displaying, *either in the form of movies or live entertainment*, 'performances' which partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments which it licenses to sell liquor by the drink." (409 U.S. 118, 93 S.Ct. 397.) (Italics added.)

It is true that the ordinances herein in question are not so limited. However, these ordinances do not attempt to regulate motion pictures. A close reading of the *LaRue* opinion reveals that the only area of regulation involved in that case which the Supreme Court found "within the limits of the constitutional protection of freedom of expression" was that of motion pictures and theatrical productions.

16. Plaintiffs in L.A. 29917 allege in their complaint that Orange County Ordinance No. 2356 is not only unconstitutional on its face for the reasons previously discussed, but is also unconstitutional *as applied* to them. While this latter alle-

III

Plaintiffs also contend that the local ordinances violate the equal protection clause of the Fourteenth Amendment to the United States Constitution in that they arbitrarily discriminate between theater-type establishments and other public places.[17] The basis of this complaint are the exemptive provisions stating that the ordinances "shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances." (Art. 3 of Orange County Ordinance No. 2536, see fn. 4, *ante*; § 5 of Sacramento County Ordinance No. 1054, see fn. 6, *ante*; § 5 of Sacramento County Ordinance No. 1055, see fn. 7, *ante*; § 26.64 of Sacramento City Ordinance No. 2856, see fn. 9, *ante*.)[18] This statutory phrase repeats verbatim the language of the exception identically contained in Penal Code sections 318.5 and 318.6.

Recently we said in Serrano v. Priest, *supra*, 5 Cal.3d 584, 597, 96 Cal.Rptr. 601, 609, 487 P.2d 1241, 1248: "As recent decisions of this court have pointed out, the United States Supreme Court has employed a two-level test for measuring legislative classifications against the equal protection clause. 'In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. [Citations.]

"'On the other hand, in cases involving "suspect classifications" or touching on "fundamental interests," [fn. omitted] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.' (Westbrook v. Mihaly (1970) 2 Cal.3d 765, 784–785, 87 Cal. Rptr. 839, 471 P.2d 487 . . ., vacated on other grounds (1971) 403 U.S. 915, 91 S.Ct. 224, 29 L.Ed.2d 692 . . .; In re Antazo (1970) 3 Cal.3d 100, 110–111, 89 Cal.Rptr. 255, 473 P.2d 999 . . .;

gation asserts a distinct constitutional challenge (cf. Cox v. Louisiana (I), *supra*, 379 U.S. 536, 555–558, 85 S.Ct. 453, 13 L.Ed.2d 471; Cox v. Louisiana (II), *supra*, 379 U.S. 559, 564–565, 85 S.Ct. 476, 13 L.Ed.2d 487;) plaintiffs have not pursued the point and present no argument on it. Nor does the reporter's transcript of the hearing on the preliminary injunction reveal that this claim was urged before the trial court. None of the plaintiffs in the Sacramento cases urge that the Sacramento ordinances are additionally unconstitutional *as applied* to them. Under the circumstances and in view of our foregoing conclusion as to the validity of the ordinances, we deem it unnecessary to discuss the point.

17. Although plaintiffs did not expressly ground this challenge on state constitutional grounds, the trial court in No. 28017 did base its preliminary injunction on both the federal and state grounds (i. e., Cal.Const., art. I, §§ 11, 21, as well as art. XX, § 18). Since we have construed the provisions of article I, sections 11 and 21 as "substantially the equivalent" of the federal equal protection clause, our discussion of plaintiffs' federal challenge will also apply to any claim assertible under the state Constitution. (See Serrano v. Priest (1971) 5 Cal.3d 584, 606, fn. 11, 96 Cal.Rptr. 601, 487 P.2d 1241.)

18. The Orange County ordinance does not define this terminology. However, the two Sacramento County ordinances identically provide further information. (§ 2 of Ordinance No. 1054 and § 2 of Ordinance No. 1055.) (See fns. 6 and 7, *ante*.) The City of Sacramento ordinance also supplies a definition, whose wording differs in only insubstantial form from that contained in the county ordinances. (§ 20.60 of Sacramento City Ordinance No. 2856, see fn. 9, *ante*.) While we need not repeat either definition we note in passing that we do not consider either statement to be statutorily vague. Nor do we believe that the exemption is vague even as it stands by itself in the Orange County ordinance. None of the plaintiffs raises vagueness as an issue before us.

see Purdy & Fitzpatrick v. State of California (1969) 71 Cal.2d 566, 578–579, 79 Cal.Rptr. 77, 456 P.2d 645 . . . .)" (Original italics.)

In view of our foregoing analysis we are satisfied that the cases at bench neither involve suspect classifications nor touch upon a fundamental interest so as to require our application of the "strict scrutiny" test in examining the classifications under attack. As we have explained, the ordinances do not infringe upon rights of free expression either in respect to persons serving food or beverages or in respect to entertainers and performers but are valid regulations of conduct under the police power.

Nor do we perceive how the instant cases involve a "suspect" classification. Indeed, plaintiffs make no such argument. Only the amicus appears to advance a claim which has some oblique reference to an arbitrary classification based on wealth. His point seems to be that the customer at a bar with a "cheap glass of beer" is denied enjoyment of the same type of entertainment permitted his "richer companion" in a theater. Generally speaking, a theater customer is charged more for a performance whether it is presented in the nude or not. We fail to see how this plain fact of life creates a suspect classification.

[10, 11] We, therefore, inquire whether the distinction inherent in the "theater exemption" bears some rational relationship to a conceivable governmental purpose. (Serrano v. Priest, *supra*, 5 Cal.3d at p. 597, 96 Cal.Rptr. 601.) We are of the opinion that it does. We judicially notice (Evid.Code, § 459, subd. (a)), as a matter of generalized knowledge (Evid.Code, § 451, subd. (f)), that theater entertainers usually perform on a stage removed from the audience, while waiters and waitresses must by virtue of their calling mingle constantly with the patrons. Similarly, if entertainers perform on a stage in a bar, that stage is likely to be much smaller and closer to the patrons than is a stage located in a theater. As noted *supra* in our discussion of the police power, there are conceivable and legitimate state purposes involved in regulating the exposure of the pubic area, genitals or breasts by waiters, waitresses and entertainers. Such purposes conceivably include the furtherance of the public order, morals and welfare. But the same considerations are arguably not involved in a theater where nude persons are generally separated from the customers by a stage of large dimensions. Situations provide a rational basis to treat differently nude performers in theaters, on the one hand, and nude performers, waiters and waitresses in establishments such as plaintiffs' on the other.

[12] In sum we hold that the ordinances deny neither freedom of speech and expression nor the equal protection of the laws but are in all respects valid and constitutional regulations of conduct. Sections 318.5 and 318.6 of the Penal Code authorizing such ordinances were enacted after our decision in In re Giannini (1968) 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535. To the extent that it is inconsistent with the views expressed herein *Giannini* is overruled.

In Sac. 7906 the appeal is dismissed as moot. In L.A. 29917 the order granting a preliminary injunction is reversed. In Sac. 7904 and Sac. 7905 each of the orders denying a preliminary injunction is affirmed.

WRIGHT, C. J., and McCOMB and BURKE, JJ., concur.

TOBRINER, Justice (dissenting).

I dissent.

I sympathize with the majority in its valiant and erudite effort to uphold this legislation and these ordinances, and to fit elusive, changing, and often distasteful practices into neat categories of prohibition. Unfortunately we deal here with a subject matter that, as the courts have too often found, invites ambiguous strictures that inadvertently reach too far and wide. The legislative attempt at regulation not only fails, but extends beyond the intended

purpose and catches within its fold the constitutionally protected.

At the outset, I would emphasize that I see no constitutional objection to the statute or the ordinances as to the regulations of waiters or waitresses who serve food or beverages; I see no element of communication in this activity that deserves constitutional protection.

In extending its proscriptions beyond those who serve food or drink to those who are entertainers, however, this legislation obviously reaches too far and too wide and illustrates the overbreadth that, as I have noted, often attends these prohibitory enactments. This overreaching is perhaps most obviously revealed by the state enactment which authorizes ordinances which prohibit *male* entertainers from performing when bare-breasted.

The prohibition of the male bare-breasted entertainer, in this day and age, is for all the reasons set forth in this dissent an infraction of the constitutional protection of communicative entertainment, and, in addition a somewhat ludicrous example of overbreadth. I shall point out that the ordinances violate the Constitution to the extent that they regulate the presence or absence of costumes for male or female entertainers, but even assuming the validity of the regulation of the bare-breasted female entertainer, I submit that no case can be made to forbid the performance of the shirtless male entertainer. The custom of exposing the upper portion of the male body is universal at beaches, swimming pools, and at all manner of places; a statute that presumed to mandate the wearing of shirts, even for "the entertainer," upon the basis that it promoted or preserved "morality," must fail because it reaches far wide of its announced mark and far beyond any rational purpose. Yet "precision of regulation must be the touchstone" when First Amendment rights are implicated (NAACP v. Button (1963) 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405); overbreadth is fatal to the survival of the enactment. (See, e. g., Coates v. City of Cincinnati (1971) 402 U.S. 611, 616, 91 S. Ct. 1686, 29 L.Ed.2d 214; NAACP v. Button, *supra*.)

There can be no question but that the statute purports to undertake this grand sweep of male and female "nudity" within its scope; it sanctions the ordinance that "regulates the exposure of the genitals or buttocks of or the *breasts* of any person who acts as a *waiter*, waitress or *entertainer*."[1] (Pen.Code, § 318.5.) (Emphasis added.) Hence, it encompasses the prohibition of the exposure of the "breasts" of a male entertainer. That the draftsman intended to include the male entertainer is borne out by the specific reference to the "breasts of any *female* participant" in the following section 318.6; the inclusion of the male, as distinguished from the female, in section 318.5, must have been deliberate. The broad, loose language of that section would cover such entertainers as the shirtless crooner, the member of a rock band, the principal character in Eugene O'Neil's "Emperor Jones," and an endless list of bare-breasted actors. The lengths to which the statute apparently goes in the regulation of entertainment leads us into a legalistic theater of the absurd.

The ordinances cannot stand unless the state legislation protects them against the attack that they invade the area of regulation of sexual activities preempted by the state. (In re Lane (1962) 58 Cal.2d 99, 22 Cal.Rptr. 857, 372 P.2d 897; People v. Hansen (1966) 245 Cal.App.2d 689, 54 Cal.Rptr. 311.) The state legislation is vulnerable, as I have explained, to the charge of overbreadth; if it fails, the ordinances, presumably, cannot stand. But I shall proceed to assume that the ordinances do not succumb to this attack; I shall weigh them independently in the constitu-

1. "breast. . . . 1. The fore or ventral part of the body, between the neck and the abdomen; the front of the chest; as, the *breast* of a man." (Webster's New Internat. Dict. (2d ed. 1957) p. 330.)

tional scales; I shall point out why the ordinances as applied to female and male entertainers, dangerously intrude upon constitutional protections.

The principle that communicative entertainment constitutes a protected mode of expression under the First Amendment is a basic proposition not subject to question. That protection dates from the decision of the United States Supreme Court in Joseph Burstyn v. Wilson (1952) 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, which struck down a New York statute banning sacrilegious motion pictures. The court stated that: "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." (343 U.S. at p. 501, 72 S.Ct. at p. 780.) Subsequent decisions confirmed that the First Amendment protects films attacked for portrayal of nudity or sexual behavior. (Jacobellis v. Ohio (1964) 378 U. S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 ["Les Amants"]; United States v. A Motion Picture Film (2d Cir. 1968) 404 F.2d 196 ["I Am Curious—Yellow"].)

The reach of the First Amendment does not depend upon the recordation of a performance on film; the live theatre is a medium of social expression equal in emotional appeal to the motion picture. Thus the courts have extended the protection of the First Amendment to dramatic stage productions (Barrows v. Municipal Court (1970) 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483 ["The Beard"]), to musical shows (P.B.I.C., Inc. v. Bryne (D.Mass.1970) 313 F.Supp. 757, vacated to consider mootness (1971) 401 U.S. 987, 91 S.Ct. 1222, 28 L. Ed.2d 526 ["Hair"]), to guerrilla theater (Schact v. United States (1970) 398 U.S. 58, 90 S.Ct. 155, 26 L.Ed.2d 44), to topless dancing (In re Giannini (1968) 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535) and to burlesque (Hudson v. United States (D.C. App.1967) 234 A.2d 903; Adams Theater Co. v. Keenan (1953) 12 N.J. 267, 96 A.2d 519, 520 (dictum).[2]

This court ruled on the subject of nude entertainment in In re Giannini (1968) 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535, which involved criminal charges against a topless dancer and her manager. Overturning convictions of lewd exposure (Pen.Code, § 314, subd. 1) and lewd conduct (Pen.Code, § 647, subd. (a)), we held in that case, that "the performance of a dance for an audience constitutes a method of expression that, in the absence of proof of obscenity, warrants the protection of the First Amendment." (69 Cal.2d 563, 567, 72 Cal.Rptr. 655, 658, 446 P.2d 535, 538.) We reasoned that: ". . . *all* forms of communication, not merely the expression of concrete and definite ideas, *potentially* receive First Amendment protection. 'We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. . . . Though we see

2. This protection does not extend to bar suppression of obscene performances. But "obscenity" is a term of art in constitutional law. It cannot be equated with nudity (see People v. Noroff (1967) 67 Cal.2d 791, 63 Cal.Rptr. 675, 433 P.2d 479) or vulgarity (Cohen v. California (1971) 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284). A performance is obscene only if it violates Penal Code section 311, which defines obscenity as follows: "'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, apply contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." (See also Memoirs v. Massachusetts (1966) 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1).

nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.' (Winters v. New York (1948) 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L. Ed. 840, 847.) 'Also encompassed [within the right of freedom of speech] are amusement and entertainment as well as the exposition of ideas.' (Weaver v. Jordan (1966) 64 Cal.2d 235, 242, 49 Cal.Rptr. 537, 542, 411 P.2d 289.) In [the] light of this approach, the performance of the dance indubitably represents a medium of protected expression." (69 Cal.2d at pp. 569–570, 72 Cal.Rptr. at p. 660, 446 P.2d at p. 540.) (Fns. omitted; emphasis in original.)

We pointed out in *Giannini* that, "of course, a conclusion that Iser's theatrical dance prima facie gains a First Amendment protection does not affect the central question presented in this case; whether her performance loses this privileged status because it is obscene." (69 Cal.2d at pp. 570–571, 72 Cal.Rptr. at p. 660, 446 P.2d at p. 540.) Obscenity, however, requires proof that the material presented affronts contemporary community standards; since the state presented no evidence of community standards, we concluded that the convictions must be reversed.

In Barrows v. Municipal Court (1970) 1 Cal.3d 821, 83 Cal.Rtpr. 819, 464 P.2d 483, we issued a writ of prohibition to prevent a criminal prosecution based on a simulated sexual act in a play. We stated as a primary proposition "that live plays performed in a theater before an audience are entitled to the same protection under the First Amendment as motion pictures . . magazines . . . and newspapers." (1 Cal.3d at p. 824, 83 Cal.Rptr. at p. 821, 464 P.2d at p. 485.) [3] Later in the opinion we declared that "Dramatic license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero. Neither do we intend to imply, however, that conduct or speech in a theatrical production is to be judged by the same standards as conduct or speech occurring on the street or other public place. *Giannini* makes it clear that 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.' (69 Cal.2d [563] at p. 572, 72 Cal. Rptr. [655], at p. 661, 446 P.2d [535] at p. 541.) We particularly reaffirm this portion of the decision in *Giannini*, for any more restrictive rule could annihilate in a stroke much of the modern theater and cinema. The loss to culture and to First Amendment rights would be equally tragic." (1 Cal.3d at pp. 830–831, 83 Cal.Rptr. at p. 825, 464 P.2d at p. 489.)

The recent decision of the United States Supreme Court in California v. LaRue (1972) 409 U.S. 109, 93 S.Ct. 390, 34 L. Ed.2d 342, adheres to this line of precedent. *LaRue* passed upon a regulation which, in addition to banning live or filmed sexual acts, prohibited the actual or simulated display of the genitals by entertainers in bars and nightclubs. Although observing that the prohibited performances "partake more of gross sexuality than of communication" (409 U.S. at p. 118, 93 S. Ct. at p. 397, the court found a sufficient communicative element to declare its agreement with the district court that "these regulations on their face would proscribe some forms of visual presentation

3. *Barrows'* reference to the First Amendment protection accorded to "live plays performed in a theater" (1 Cal.3d at p. 824, 83 Cal.Rptr. at p. 821, 464 P.2d at p. 485) may account for the exception in Penal Code sections 318.5 and 318.6, and in the ordinances before us, for performances in "a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances." But nothing in *Barrows* suggests that a play ceases to be protected expression if presented in some other building, nor that to qualify for such protection the "theater" must have moveable scenery and seats which bolt to the floor. (Cf. Schnet v. United States (1970) 396 U.S. 58, 90 S.Ct. 155, 26 L.Ed.2d 44 [outdoor "guerrilla theater"].)

which would not be found obscene under *Roth* and subsequent decisions of this Court." (409 U.S. at p. 116, 93 S.Ct. at p. 396.) The court explained, however, that the issue arises "in a context of licensing bars and nightclubs to sell liquor by the drink." (Ibid.) Noting that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals" (ibid.), the Court sustained the department's conclusion "that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place simultaneously." (Ibid.)

The Court proceeded to hold that "While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, *the critical fact is that California has not forbidden these performances across the board.* It has merely proscribed such performances in establishments which it licenses to sell liquor by the drink." (409 U.S. at p. 118, 93 S.Ct. at p. 397. (Emphasis added.)

In the present case, the critical fact is that Orange and Sacramento Counties have forbidden nude entertainment across the board, without respect to whether the place of entertainment serves alcoholic beverages. The majority's attempted distinction of *LaRue* upon the ground that it distinguishes between "movies" and "live entertainment" not only directly contravenes the language of *LaRue* but also violates common sense. The extraordinary powers conferred upon the state by the Twenty-first Amendment, which saved the alcoholic beverage regulations from unconstitutionality in *LaRue*, cannot save the ordinances before us now. I conclude that these ordinances on their face proscribe some forms of visual presentation which may properly claim protection under the First Amendment, and consequently that the ordinances must be found unconstitutional.

The message of all of the decisions is clear: except when exercising its extraordinary powers under the Twenty-first Amendment, the state may not ban non-obscene entertainment. But the majority believe they have found a road around this formidable constitutional protection. Entertainment, they assert, can be dichotomized into speech and conduct; the state need not touch speech, but by barring conduct associated with that speech, the state may effectively proscribe entertainment.

The adoption of this theory would let the censor loose without constitutional restriction to condemn at will any and all communicative entertainment. While avoiding reference to the actor's speech, the state could ban his gestures, his costuming (or amount of costuming), the positioning of the actors, the lighting of the stage, or whatever other "conduct" it chooses. Nor is the logic of the majority opinion confined to entertainment in bars or restaurants; it applies equally to the legitimate theater and to the motion picture. Neither is the logic of the opinion confined to the subject of nudity. If a county seeks to prohibit entertainers, or participants in a public demonstration, from wearing long hair, unfashionable dress, or uniforms (cf. Schact v. United States (1970) 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44), the majority opinion can be construed to uphold such legislation.

The majority opinion, indeed, dangerously destroys long-held, laboriously built constitutional protections of the communicative arts. As of this writing a metropolitan newspaper carries a full front page picture of bare-breasted male and female dancers of Senegal who are performing in the San Francisco Bay Area.[4] Similar productions are the Ballet Africains and a myriad of other ethnic dances. The majority's metaphysical severance of speech from "conduct," (or the extent of cos-

4. "This World," edited by the San Francisco Chronicle, a section of the San Francisco Sunday Examiner and Chronicle, March 11, 1973, page 1.

tumes) would permit the prohibition of such "nude" dancing. Of course the majority hastens to assure us that the ordinances, as drafted, do not regulate such performances if given in a "theater," but, assuming that questionable position, we can find no similar limitation in the majority's rationalization for its ruling. The rationalization, the ruling, the holding, is that "nude" conduct can be differentiated from speech or communication and, as such, subjected to regulation or prohibition. At one stroke of the pen the majority has thereby torn down the constitutional protections of the communicative arts, exposing the drama, the motion picture, the dance, the opera, the visual arts, sculpture, and communicative entertainment in general, to unbridled censorship. The careful delineation of constitutionally protected expressions as opposed to those that are obscene under the decisions is apparently no longer viable. The rulings are circumvented by the new conduct-communication fictitious dualism.

If we accept the conduct-speech dichotomy, enabling government thereby to proscribe "conduct," what remains of constitutional protection for communication of ideas? The Legislature could enact legislation prohibiting the "conduct" or performance of any play, opera or ballet that the censor deemed "subversive" or "revolutionary." Under the theory of the majority, the "speech" in the play, opera or ballet would not be proscribed but only *the conduct*, consisting of the *acting* and the *physical movements* of the performers or "entertainers." The constitutional protection of free speech as heretofore developed in the cases would not apply. If the majority's destructive doctrine were to be followed, the First Amendment's protections of the communicative arts as expressions of free speech would be obliterated.

The fallacy of the majority's attempt to split speech from action is excellently expressed in the dissenting opinion of Justice Marshall in *LaRue*. He observed that "If . . . movies, plays, and dance enjoy constitutional protection, it follows, ineluctably I think, that their component parts are protected as well. It is senseless to say that a play is 'speech' within the meaning of the First Amendment, but that the individual gestures of the actors are 'conduct' which the State may prohibit. The State may no more allow movies while punishing the 'acts' of which they are composed than it may allow newspapers while punishing the 'conduct' of setting type."[5] (409 U.S. at p. 130, 93 S.Ct. at p. 403.)

In like vein I suggest that the costuming, or lack of costuming, of an entertainer or dancer is an integral component of the entertainment or dance.[6] To require the entertainer to wear costuming inappropriate or hampering to his role is simply an indirect way of banning the entertainment.

Barred by the present law of obscenity from sustaining the ordinances, the majority seize upon a doctrine that is not applicable to the problem at all. The majority turns to a decision, United States v. O'Brien (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, that involves symbolic free speech, a case that is entirely factually distinguishable from the present one, and that develops a theory alien to the instant issue.

The facts of *O'Brien* do not remotely resemble the present case. O'Brien was accused of violating an amendment to the Universal Military Training and Service Act of 1948 prohibiting the knowing destruction of a draft card. (50 U.S.C. § 462(b).) This amendment, the court stat-

5. I find nothing in the majority opinion in LaRue to suggest that the majority there rejected Justice Marshall's analysis; to the contrary, the majority clearly recognizes that the regulations at issue in *LaRue* restrict protected expression.

6. *Cf.* Schact v. United States (1970) 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44, which held unconstitutional a federal statute which provided that "while portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force." (10 U.S.C. § 772(f).)

ed, "deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views." (391 U.S. at p. 375, 88 S.Ct. at p. 1678.) Concluding that the amendment was directed solely at the proscription of conduct unrelated to protected speech, the court upheld the constitutionality of the enactment on its face. (See 391 U.S. at pp. 381–382, 88 S.Ct. at p. 1681.)

O'Brien contended, however, that he burned his draft card to *protest* against war, and consequently that the act as applied to him was unconstitutional. He claimed that his protest came under the rubric of free speech because it was "*symbolic* speech." The Court stated that it could not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." (391 U.S. at p. 376, 88 S. Ct. at p. 1678.) Yet the court did not entirely exclude symbolic speech from the protection of the First Amendment. It concluded, instead that incidental governmental restriction upon symbolic speech was permissible, but only when essential to further an important or substantial governmental interest. (391 U.S. at pp. 376–377, 88 S.Ct. at p. 1678.)

The grounds for distinction between *O'Brien* and the present case are manifold. *O'Brien* involved a law which prohibited burning of draft cards wherever that conduct occurred, and which did not on its face aim at regulation of protected speech; the ordinances at bar proscribe nudity only when it occurs in the context of protected communicative entertainment. The act of burning a draft card bears no integral relation to protected communication; the costuming of an entertainer is unquestionably an integral part of the entertainment. The language in *O'Brien* on which the majority relies discusses the constitutionality of a law regulating conduct *as applied* to an act of "symbolic speech"; the present case concerns the constitutionality on its face of ordinances regulating protected activity.

Finally, and most important, in *O'Brien* the court extended limited First Amendment protection to "symbolic speech"—conduct which, normally noncommunicative, is invested with symbolic significance by the protestant. The present case has nothing to do with symbolic speech. It has nothing to do with protest. It concerns communicative entertainment, an activity which heretofore has been entitled not to limited but to *full protection* under the First Amendment. The majority opinion stands *O'Brien* on its head, transforming that case, which involved the extension of the First Amendment into the peripheral region of symbolic speech, into a weapon which renders the protected region of communicative entertainment vulnerable to the inroads of censorship.

I come now to the second step in the majority's analysis.

The majority opinion very reluctantly assumes for the sake of argument that "there may be in some instances a 'communicative element' in conduct falling within the instant ordinances sufficient to bring into play the First Amendment" (at p. 695 an assumption that I believe is compelled by the logic of the cases and the language of *LaRue*. It then sets out to evaluate the ordinances according to the fourfold test stated in *O'Brien*, and, after a brief and cursory examination, approves the ordinances. I shall develop the view that the majority misunderstands and misapplies the *O'Brien* standards and that, under a proper application of those tests, the present ordinances fail on at least three of the four measures.

I reiterate the language of the Supreme Court in *O'Brien*: "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of

conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (391 U. S. at pp. 376–377, 88 S.Ct. at p. 1679.) (Fns. omitted.)

This language establishes a two level test. Laws which do not affect the communicative element of conduct are constitutional if they fall within the police power or other authority of the state. Laws which involve incidental limitations on First Amendment freedoms, however, must meet a more exacting standard. The mere existence of a governmental interest in regulating such conduct will not suffice; that interest must be a substantial or important interest, unrelated to the suppression of free expression, and the law must not restrict free expression more than the minimum necessary to further the state interest.

This two-level analysis bears a close similarity to the approach used by this court and the Supreme Court in equal protection cases. "In the typical equal protection case the classification need only bear a rational re-relationship to a conceivable legitimate state purpose." (Curtis v. Board of Supervisors (1972) 7 Cal.3d 942, 951–952, 104 Cal.Rptr. 297, 303, 501 P.2d 537, 543.) "On the other hand, in cases involving 'suspect classifications' or touching on 'fundamental interests,' . . . the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations omitted.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (Westbrook v. Mihaly (1970) 2 Cal.3d 765, 784–785, 87 Cal.Rptr. 839, 852, 471 P.2d 487, vacated on other grounds (1971) 403 U.S. 915, 91 S.Ct. 2224, 29 L.Ed.2d 692.)[7]

Throughout both the equal protection cases and *O'Brien* and its predecessors runs a common theme: when a law touches upon a fundamental interest—and protected First Amendment communication is clearly a fundamental interest—the courts must subject that law to close and critical scrutiny, must determine what state interest the law will further, and must measure that interest to see if it can properly be described as of "compelling," "substantial," or "important" character. And then the courts must further examine the law to be sure that it infringes upon fundamental rights no more than absolutely necessary to further the interest of the state.

Mindful of our obligation to subject these ordinances to an active and critical analysis, I take up the four tests set out in *O'Brien*. The *first test* is that the law must be *within the constitutional power of government*. Unlike the majority, I find it quite doubtful whether the government has an inherent power to regulate nude entertainment in bars and restaurants. I have no doubt that it may regulate nudity on public streets, where such behavior may offend bystanders; on the other hand, the government asserts no interest in banning private nudity, and probably lacks the power to do so. Bars and restaurants fall in

7. Accord: Serrano v. Priest (1971) 5 Cal. 3d 584, 597, 96 Cal.Rptr. 601, 487 P.2d 1241; See Weber v. Aetna Casualty & Surety Co. (1972) 406 U.S. 164, 172–173, 92 S.Ct. 1400, 31 L.Ed.2d 768; Purdy & Fitzpatrick v. State of California (1969) 71 Cal.2d 566, 578–579, 79 Cal. Rptr. 77, 456 P.2d 645.

between these extremes. Although not as private as individual homes, nevertheless the nudity within bars and restaurants is not visible from public streets or sidewalks. The customers who enter such establishments do so voluntarily, knowing they will view nude entertainment, and choosing to do so. There appears to be no evidence that either the customers or the entertainers suffer the slightest harm from the experience. The majority's assumption that the state has the power to ban consensual adult behavior, harmful neither to participants nor bystanders, on the ground that some nonparticipants deem that behavior immoral, is certainly open to dispute.[8]

I shall, however, assume for the sake of argument that the state has some interest in regulating nude entertainment in bars and restaurants, so that we may proceed to the *second issue* under the *O'Brien* test: whether that state interest can fairly be described as "*substantial*" or "*important*." The majority opinion asserts that "it cannot be gainsaid that the regulations further 'an important or substantial governmental interest' [citing *O'Brien*, 391 U.S. at p. 377, 88 S.Ct. at p. 1679] in promoting public morals." (At p. 695, of 107 Cal.Rptr. —, — P.2d —.) But the rest of the majority opinion does not discuss that grand abstraction: the state's interest in promoting a moral society. The opinion, instead, discusses the state's interest in regulating nude conduct. While I do not dispute that the promotion of the truly moral society is a laudable public purpose, I can and do maintain that banning nude entertainment will not contribute in any significant degree to this end; or, in other words, that the state's interest in banning such entertainment cannot be considered a substantial or important interest.

Persons viewing or creating nude entertainment are adults who voluntarily choose to do so.[9] Presumably the audience derives some satisfaction from the performance or they would not attend; presumably the performers derive some benefit or they would not perform. Neither are harmed. The performance may be tawdry and vulgar, although the ordinances are not limited to performances of such character; in any case the state's interest in elevating the public taste is among the least substantial of its interests.[10] The majority asserts that bars offering nude entertainment may blight a neighborhood; so may auto junkyards; the solution to both cases lies in proper zoning.

Indeed, the majority's argument is reduced to the assertion that whenever the majority of voters of a county, or their representatives, deem certain behavior immoral, it follows ipso facto that (a) the be-

8. The *LaRue* majority's statement that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals" (409 U.S. at p. 114, 93 S.Ct. at p. 395), followed by its reliance upon the Twenty-first Amendment to sustain the regulations, implies that the majority also doubts that the "normal state authority over public health, welfare, and morals" is sufficient to justify regulation of nude entertainment.

9. See Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 102, 84 Cal.Rptr. 113, 465 P.2d 1; In re Giannini (1968) 69 Cal.2d 563, 575–576, fn. 8, 72 Cal.Rptr. 655, 446 P.2d 535; Robins v. County of Los Angeles (1967) 248 Cal.App.2d 1, 12, 56 Cal.Rptr. 853.

10. As we stated in People v. Noroff (1967) 67 Cal.2d 791, 796–797, 63 Cal.Rptr. 575, 433 P.2d 479, and reiterated in Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 102–103, fn. 27, 84 Cal.Rptr. 113, 125, 465 P.2d 1, 13: "The United States Supreme Court has wisely recognized that ultimately the public taste must determine that which is offensive to it and that which is not; a public taste that is sophisticated and mature will reject the offensive and the dull; it will in its own good sense discard the tawdry, and once having done so, the tawdry will disappear because its production and distribution will not be profitable. Understandably, such maturity does not come quickly or easily, and, in a time when the structures of Victorianism have been replaced by wide swings of extremism, it seems hopelessly remote."

havior really is immoral,[11] (b) the state has an interest in suppressing the behavior, and (c) that interest is so compelling, so substantial and important, that it justifies restrictions on First Amendment communication. This non-sequitur recitation is not the sort of active and critical analysis required in cases which touch upon fundamental rights; to the contrary, it reduces to an assertion that the mere fact that a county wants to ban nude entertainment somehow proves that such legislation is constitutional.

The *third requirement* under *O'Brien* is that the governmental interest be *unrelated to the suppression of free expression.* As I pointed out earlier in this opinion, the ordinances at bar do not ban nudity generally; they regulate the costuming (nudity or simulated nudity) of entertainers. Thus the governmental interest underlying these ordinances, whatever its exact dimensions, must be an interest in prohibiting a *type of entertainment.* Such an interest cannot be classed as one unrelated to the suppression of free expression.

The *fourth test* is that the law impose *no greater restriction than is essential* to the furtherance of an important or substantial governmental interest. This test requires us to identify the governmental interest in question. If it is to prohibit nude entertainment, then the ordinances go further than necessary in banning the simulation of nudity; if it is to avoid neighborhood blight, they go further than needed in banning such entertainment regardless of location; if it is to eliminate the tawdry and vulgar, they go too far in banning all nude entertainment of whatever sophistication or refinement. Nowhere in the majority opinion can I discern a state interest which so closely parallels the ordinances that they could be said to proscribe no more than is necessary to further that interest.

If compelled to describe the state's interest in regulating nude entertainment before voluntary adult audiences, I should be constrained to use the antonyms of the terms set out in *O'Brien*; I would describe that interest as "noncompelling," "unimportant," "insignificant," and "dubious." I would conclude that such an interest does not justify any restriction upon protected expression.

In conclusion, I address a brief comment to the objectives of these ordinances. We live in an era in which political censorship is, fortunately, rare, and religious censorship virtually nonexistent; the hand of the censor today is largely directed at preventing or impeding the communication of sexual ideas and emotions. The censor has little evidence that such communication is harmful, and little rational basis to term it immoral, but sometimes neither evidence nor reason can prevail with a man imprisoned in his own prejudices. He can, with greater justice, describe much sexual communication as vulgar—although the courts can hardly serve as the appointed monitors to stamp out "vulgarity." (Cohen v. California (1971) 403 U.S. 15, 25, 91 S.Ct. 1780, 29 L.Ed.2d 284.)[12]

11. In Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 84 Cal.Rptr. 113, 465 P.2d 1, we noted that "the courts of this state have recognized the inconclusive and indecisive state of the consensus of society regarding the propriety and morality of public and quasi-public displays of female breasts" (2 Cal.3d at p. 101, 84 Cal.Rptr. at p. 124, 465 P.2d at p. 12); and again that there exists "an obvious lack of societal consensus as to the morally permissible degree of diaphanous raiment and public dishabille" (2 Cal.3d at p. 102, 84 Cal.Rptr. at p. 125, 465 P.2d at p. 13). I conclude from these observations that there is a "lack of societal consensus" as to whether measures prohibiting the display of female breasts, or any other portion of the human body, will have any tendency to promote the public morals.

12. The history of the *Cohen* case is of some interest on the issue of distinguishing expression from conduct. Cohen was convicted of disturbing the peace after he walked through the corridor of the

Nevertheless, the courts have permitted the censorship of communication or entertainment to a limited extent by holding that obscenity is not within the protection of the First Amendment. The Legislature, pursuant to this permission, has in Penal Code section 311.6 declared that obscene live conduct before an audience is a misdemeanor. But both the courts and the Legislature have been careful to assure that censorship stays within bounds by insisting that conduct is not obscene unless it exceeds customary limits of candor and lacks redeeming social importance.

If the present ordinances merely proscribe obscene entertainment, they would duplicate Penal Code section 311.6 and accomplish no useful purpose. These ordinances, however, serve a more invidious end: to ban nude entertainment even when such entertainment does not exceed customary limits of candor or does possess redeeming social importance. In so doing they destroy the balance struck by the courts between the interest of the people in open communication and the lesser interest of the state in censoring obscenity; they extend the criminal sanction into a region of protected expression.[13]

MOSK, J., concurs.

Los Angeles County Courthouse wearing a jacket bearing the words "Fuck the Draft." The Court of Appeal upheld the conviction, reasoning that Cohen's behavior consisted of both speech and nonspeech elements which, under the facts of that case, could properly be punished as "offensive conduct" under Penal Code section 415. (People v. Cohen (1969) 1 Cal.App.3d 94, 103–104, 81 Cal.Rptr. 503.) We denied a petition for hearing. The United States Supreme Court granted certiorari and reversed the conviction. (Cohen v. California (1971) 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284.) Its opinion states: "While the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." (403 U.S. at p. 25, 91 S.Ct. at p. 1788.) I suggest that the majority in the present case is making the same error as did the Court of Appeal in *Cohen*: namely, assuming that vulgar expression is somehow not expression at all, but merely unexpressive conduct.

13. I dissent also from the majority's resolution of the equal protection issue, which resolution rests upon the majority's mistaken premise that the ordinances at issue here do not touch upon any constitutionally protected right.

Kenneth I. PERSION, Petitioner,
v.
The STATE BAR of California, Respondent.
L. A. 30077.

Supreme Court of California,
In Bank.
May 11, 1973.

Proceeding to review recommendation of Disciplinary Board of State Bar. The Supreme Court held that misappropriation and commingling funds warrants suspension for three years on conditions of probation, including actual suspension for the first year.

Suspension ordered.

1. Attorney and Client ⇐57

Burden is on petitioner seeking a review of recommendation of Disciplinary Board of State Bar to show that Board's recommendation is erroneous or unlawful.

2. Attorney and Client ⇐44(2)

Attorney's misappropriation of a client's funds is offense which involves moral turpitude and warrants disbarment in absence of extenuating circumstances.

3. Attorney and Client ⇐58

Misappropriation and commingling funds warrants suspension for three years

18 Cal.App.3d 181

[June CROWNOVER et al., Plaintiffs and Respondents,

v.

James A. MUSICK, etc. et al., Defendants and Appellants.

Civ. 10517.

Court of Appeal, Fourth District, Division 2.

June 18, 1971.

Hearing Granted Aug. 13, 1971.] 181

APPENDIX B-1.

OPINION

[1184] GARDNER, Presiding Justice.

Following the enactment of Penal Code, sections 318.5 and 318.6,[1] in 1969, the County of Orange enacted Ordinance No. 2356, which states, in pertinent part:

[1185] "Article 1.

"Section 311.011.

"• • • Every person is guilty of a misdemeanor who, while acting as a waiter, waitress or entertainer in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment:

"(a) Exposes his or her genitals, pubic hair, buttocks, natal cleft, perineum, anal region or pubic hair region; • • •

"Article 2.

"Section 311.021.

"Every person is guilty of a misdemeanor who, while participating in any live act, demonstration, or exhibition in any public place, place open to the public, or place open to public view:

"(a) Exposes his or her genitals, pubic hair, buttocks, natal cleft, perineum, anal region, or pubic hair region; • •

"Article 3.

"Section 311.031.

"The provisions of Article 1 and Article 2 of this Division shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. • • •"

Respondents, owners of establishments serving food and alcoholic beverages and employing both nude waitresses and entertainers, filed a complaint for declaratory relief and injunction attacking the constitutionality of the ordinance. The trial [1186] court found the enactment to be unconstitutional and granted a preliminary injunction against its enforcement. The People have appealed.

THE TEST OF CONSTITUTIONALITY.

In assessing the propriety of the action of the trial court, we bear in mind certain basic principles relative to the judicial review of legislative enactments.

Legislation is presumed to be constitutional. The unconstitutionality of an enactment must be clearly demonstrated, and

1. Penal Code, § 318.5, reads:
"Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a county or city, if such ordinance directly regulates the exposure of the genitals or buttocks of or the breasts of any person who acts as a waiter, waitress, or entertainer, whether or not the owner of the establishment in which the activity is performed employs or pays any compensation to such person to perform such activity, in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment.
"The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances.
"This section shall be known and may be cited as the 'Quimby-Walsh Act.'"
Penal Code, § 318.6, reads:
"Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county, if such ordinance relates to any live acts, demonstrations, or exhibitions which occur in public places, places open to the public, or places open to public view and involve the exposure of the private parts or buttocks of any participant or the breasts of any female participant, and if such ordinance prohibits an act or acts which are not expressly authorized or prohibited by this code.
"The provisions of this section shall not apply to a theater, concert hall, or similar establishment which is primarily devoted to theatrical performances."

all doubts must be resolved in favor of the statute. (Higgins v. City of Santa Monica, 62 Cal.2d 21, 41 Cal.Rptr. 9, 396 P.2d 41; In re Madera Irrigation District, 92 Cal. 296, 28 P. 272, 675; People ex rel. Mosk v. National Research Co. of Cal., 201 Cal. App.2d 765, 20 Cal.Rptr. 516.) The legislative branch of government is charged with the responsibility of enacting laws to form the framework of a just and orderly society. It is not the function of the judiciary to review the wisdom with which the Legislature acquits itself in this obligation. Only when the law is in clear violation of the Constitution may the courts intervene. The power to declare laws unconstitutional must be used sparingly and with the utmost restraint. Any inclination to extend this prerogative on society as a whole must be firmly rejected. By reason of their protected, cloistered existence, judges are singularly ill-equipped for participation in the law making process. As Justice Frankfurter once said: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." (Mr. Justice Frankfurter concurring in Dennis v. United States, 341 U.S. 494, 525, 71 S.Ct. 857, 875, 95 L.Ed. 1137.)

The Supreme Court of this state has made it clear that constitutionality depends not on the judge's opinions of the wisdom or necessity of the law "• • • but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity?" (Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 522, 20 Cal.Rptr. 638, 642, 370 P.2d 342, 346.)

Bearing these principles in mind, we pass to the merits of this appeal.

OBSCENITY NOT AN ISSUE.

[1] Initially, we note that appellants do not contend that nudity is obscene per se. Neither is it asserted that there are obscene aspects to the nudity found in respondents' establishments. Neither Penal Code, §§ 318.5 and 318.6, nor Orange County Ordinance No. 2356 seek to proscribe *obscene* activity. The issue before the court is whether the county may broadly prohibit all forms of nudity among the waiters, waitresses and live entertainers in establishments serving food and beverages. Thus, we may resolve this appeal without the necessity of making any further addition to the already bloated body of legal literature in the field of "obscenity."[2]

Appellants' sole assertion in this appeal is that the trial judge committed error in granting the preliminary injunction because County Ordinance No. 2356 violates neither the First Amendment as made applicable to the states by the Fourteenth Amendment, nor the Equal Protection Clause. While the trial judge invalidated the ordinance on the ground that it violated the Equal Protection Clause, we feel constrained to review the First Amendment aspects of this case.

A.

Nudity Per Se.

[2] Nudity per se is not protected by the First Amendment. It cannot be seriously doubted that the state has a legitimate interest in regulating nudity in certain contexts. In the privacy of the home, nudity may not be a legitimate object of state interest. But on a crowded public street, nudity, albeit, exercised without a

2. Mr. Justice Harlan dissenting in Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 705, fn. 1, 88 S.Ct. 1298, 20 L.Ed.2d 225, noted that in thirteen obscenity cases decided by the United States Supreme Court since *Roth*, there had been *fifty-five* separate opinions among the justices.

scintilla of lewd intent, is a matter of some governmental concern. It may constitute a threat to the maintenance of public peace or, at the very least, a hazard to traffic. Only when nudity becomes part of a method of expression, such as a dance or play, does it come under the protective mantle of the First Amendment. For example, it has been held that dancing is an expression of emotions or ideas and that, therefore, nudity in the dance is entitled to First Amendment protection. (Barrows v. Municipal Court, 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483; In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535.) Similarly, nudity in the theater has been found to be symbolic speech entailing the communication of ideas and thus entitled to the protection of the First Amendment. (Barrows v. Municipal Court, *supra*.) Thus, while nudity enjoys the protection of free 1188 speech when embodied in some form of expression aimed at the conveyance of ideas, nudity per se is entitled to no such protection. As Justice Douglas stated in his dissent in Roth v. United States, 354 U.S. 476 at 512, 77 S.Ct. 1304 at 1323, 1 L.Ed.2d 1498, "No one would suggest that the First Amendment permits nudity in public places * * *."

The opinions of the Supreme Court of this state in In re Panchot, 70 Cal.2d 105, 73 Cal.Rptr. 689, 448 P.2d 385, and People v. Noroff, 67 Cal.2d 791, 63 Cal.Rptr. 575, 433 P.2d 479, are not to the contrary. These cases merely held that in the absence of sexual activity nudity is not obscene within the meaning of Penal Code, § 311(a), and may not be proscribed as such. The opinions do not discuss the power of the Legislature to regulate nudity in the exercise of its remaining police powers.

B.

Nude Waiters and Waitresses.

[3] Part of Article 1, Section 311.011 of Orange County Ordinance No. 2356 bans nude waiters and waitresses in establishments selling food or beverages. We find that in the absence of First Amendment protection the state has the power to regulate the activity of waiters and waitresses performing their duties in the nude. The state's inherent police power enables it to proscribe an activity which possesses an obvious threat to the public peace. Little by way of exposition is needed to point out that naked women in close proximity to the patrons of bars and restaurants present potential problems for the police.

Further, we find that the mantle of the First Amendment does not clothe naked barmaids. Naked waiters and waitresses are entitled to no First Amendment protection on the basis that their nudity is a form of expression of ideas, symbolic expression, or visual communication. Their activity is purely a commercial exhibition. The First Amendment guarantee of free expression is "'* * * to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people.'" (New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686.) The act of being a naked waiter or waitress involves no form of constitutionally protected expression. No constitutionally protected ideas or emotions are conveyed thereby. We cannot label the activities "symbolic speech"; rather, as indicated their nudity is a commercial production used to attract customers. Its elimination will not hinder the operation of the market place of ideas. In City of Portland v. Derrington, 451 P.2d 111, the Supreme Court of Oregon passed on the validity of an ordinance proscribing the exhibition of one or more female breasts in any place where food or alco- 1189
holic beverages were offered to the public for on-premise consumption. The court observed: "When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours."

Obviously, the sight of a naked woman conveys an emotion. This may range from

lust to disgust depending upon the age and proportions of the female and the sex and moral predilections of the viewer. We merely hold that under these circumstances the emotion conveyed is not a constitutionally protected type of visual communication. The naked waitress exists purely for the purpose of increasing liquor sales. She can hardly be held to be a part of an exchange of ideas or the bringing about of political or social change. We cannot in good conscience elevate the act of being a nude waitress to the dignity of a constitutionally protected act.

This portion of Ordinance No. 2356 has no chilling effects on any First Amendment rights of naked waitresses and waiters. Any chill they experience comes from their nudity, not from Ordinance No. 2356.

In concluding this portion of the opinion, we observe that at oral argument respondents advised this court that they were not attacking the constitutionality of the portion of the ordinance concerning waiters and waitresses—but rather only those portions of the ordinance which pertain to live entertainment.

C.

Nude Entertainers.

[4, 5] Article 2, section 311.021 of Orange County Ordinance No. 2356 effectively bans live nude entertainment in any public place. A portion of Article 1 of the same ordinance prohibits nude entertainers in establishments serving food and/or drink. As noted, *supra*, the ordinance is not limited to a proscription of obscene entertainment, merely nude entertainment; nor does it attempt to merely regulate the presentation of nude entertainment. It is a ban on nude entertainment en toto, not a limitation as to the time, place or manner of its presentation. However, the Supreme Court has held in the *Barrows* and *Giannini* cases, *supra*, that absent obscenity, nude entertainment is entitled to the protection of the First Amendment as made applicable to the states by the Fourteenth Amendment. Thus, while we do not question that such entertainment is subject to reasonable restrictions as to time, place and manner of its presentation, it may not, under these cases be totally forbidden. Under the rationale of the *Barrows* and *Giannini* opinions, *supra*, Article 2, Section 311.021 of Orange County Ordinance No. 2356 and that portion of Article 1 of the same ordinance which forbids nude live entertainers is overbroad in its application. The chilling effect it may have on the exercise of First Amendment rights as those rights are defined in *Barrows* and *Giannini*, makes it constitutionally defective. Of course, this is not to say that the county cannot establish reasonable regulations as to the time and place of such live entertainment and other restrictions pertaining to health, safety or sanitation. However, constitutionally permissible restrictions on First Amendment rights must be drawn with specificity. (In re Kay, 1 Cal.3d 930, 83 Cal.Rptr. 686, 464 P.2d 142; Castro v. Superior Court, 9 Cal.App.3d 675, 88 Cal.Rptr. 500.) "We are not persuaded by the County's argument that these sections must be viewed 'in context' in order to supply the necessary limitation * * * When restrictions in the area of free expression are at issue, an appeal to 'context' is insufficient to satisfy constitutional requirements of precision." (In re Berry, 68 Cal.2d 137, 155, 65 Cal.Rptr. 273, 285, 436 P.2d 273, 285.)

Thus, under the compulsion of the *Barrows* and *Giannini* decisions, *supra*, we hold the entertainment portions of the subject ordinance to be overbroad, and hence constitutionally impermissible.

EQUAL PROTECTION.

The court below invalidated Ordinance No. 2356 on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment. The trial judge stated that if an affluent person could see a naked woman in a theater by paying $7.00 for a ticket, a poor man should be able to enjoy the same experience in a bar by paying 75¢ for a small glass of beer. As re-

gards nude entertainment, we find the trial judge's exposition of earthy logic persuasive; however, as regards that portion of Article 1, Section 311.011 of the ordinance banning nude waiters and waitresses, we feel the court below was in error.

[6] Respondents attack not only Ordinance No. 2356, but also Penal Code, §§ 318.5 and 318.6, which it is asserted "authorize" the ordinance. Initially, it should be noted that these sections do not "authorize" such an ordinance. They merely permit cities and counties to adopt this type of ordinance free from the restraint of legislative preemption. "They do not authorize the ordinance, for if, as claimed by respondents at the trial level, the state itself could not constitutionally prohibit 'topless' and 'bottomless' in establishments of the type here involved, it cannot authorize its subdivisions to do so." (People v. Lindenbaum, 11 Cal.App.3d supp. 1, 4, 90 Cal.Rptr. 340, 342.) There is no doubt that Penal Code, §§ 318.5 and 318.6, were enacted to indicate that the Legislature had not preempted the field in this area of regulation as had been previously held in In re Lane, 58 Cal.2d 99, 22 Cal.Rptr. 857, 372 P.2d 897. We find no constitutional inhibition against such a declaration.

A.

Nude Waiters and Waitresses.

[7] As we have determined above, the protection of the First Amendment does not apply to the purely commercial activities of naked waiters and waitresses.[3]

Thus, Article 1, Section 311.011 of Orange County Ordinance No. 2356, insofar as it bans nude waiters and waitresses amounts in substance to a regulation of purely economic activity. In regard to such regulations, the Supreme Court has said: "* * * we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' Williamson v. Lee Optical Co. of Oklahoma, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563. The rules for testing a discrimination have been summarized as follows:

"'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369." (Morey v. Dowd, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485.) (See also State of California v. Industrial Accident Comm., 48 Cal.2d 365, 310 P.2d 7; Lelande v. Lowery, 26 Cal.2d 224, 157 P.2d 639.)

Initially, it is not entirely clear as against whom respondents contend they are being denied equal protection. But in any event their argument must fail. If their assertion is that nude waitresses in bars and

3. Now that the Supreme Court has put its stamp of approval on female bartenders (Sail'er Inn, Inc. v. Kirby, 95 Cal. Rptr. 329, 485 P.2d 529, filed 5/27/71), it is obvious that the county is going to have to amend the ordinance to include bartenders. We are not aware of any great ground swell of public demand for naked bartenders but the success of the topless/bottomless bars has been such that it may be reasonably anticipated that if waitresses must partially clothe themselves, there will be a mad rush to be the first to advertise totally nude female bartenders.

restaurants are being discriminated against vis-a-vis nude waitresses in theaters, it is not clear that the latter exist. If their assertion is that nude waitresses, wherever located, are being discriminated against vis-a-vis clothed waitresses, we find that the distinctions between the two types of functionaries justify their differing treatment. As we have already noted, a naked waitress working in a bar or restaurant in close proximity to the predominantly male patronage poses problems to the maintenance of the public peace of a different order than those presented by a clothed waitress. Finally, if respondents' assertion is that nude waitresses are being discriminated against vis-a-vis nude entertainers working in the same establishment, the fact that such entertainers generally perform on a stage or platform geographically removed from the patrons while the waitresses must of necessity mingle therewith provides a sufficient basis to treat the two classes differently.[4]

B.

Nude Entertainment.

[8] However, the above analysis is not applicable to respondents' contention in regard to Article 2, Section 311.021, and that portion of Article 1, relative to entertainers. As we have determined above, their activities, so long as they are not obscene, are entitled to the protection of the First Amendment. In the course of his opinion in the case of the United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234, wherein it was contended that an article of regulation violated the Due Process Clause of the Fifth Amendment, Mr. Justice Stone stated that "* * * regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." At this juncture, the Justice inserted a footnote, which read, in pertinent part:

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth * * *

"It is unnecessary to consider now [10] whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation * * *

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious * * * or racial minorities * * *; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

The suggestion of Mr. Justice Stone, that the usual presumption of constitutionality of a state statute might be reversed in the case of a statute which on its face infringes on a constitutionally protected right, impedes the free operation of the political process, or works to the detriment of a discrete and insular majority has been adopted by the Supreme Court. As Mr. Justice Douglas stated in Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169: "We have long been mindful that where fundamental rights and liberties are asserted

4. Again, we point out that at oral argument counsel for the respondents advised this court that they were not attacking the constitutionality of this ordinance insofar as it pertains to nude waiters and waitresses.

under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." (See also Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; Skinner v. State of Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655.)

In the instant case, Article 2, Section 311.021 of Ordinance No. 2356, and that portion of Article 1 pertaining to entertainers, on its face infringes on a constitutionally protected right, that of free speech. Applying the standards enunciated in Harper v. Virginia State Board of Elections, *supra*, 383 U.S. 663, 86 S.Ct. 1079, and Reynolds v. Sims, *supra*, 377 U.S. 533, 84 S.Ct. 1362, we find that the distinction the Ordinance draws between nude entertainment in theaters and that in restaurants and bars is unreasonable. Appellants attempt to justify the distinction on the ground that the entertainers were more remote from their audience in theaters than in bars, and thus less subject to molestation. However, this is not invariably the case; it is not unknown for theater entertainers to leave the stage and mingle with the audience. Further, if the County wishes merely to assure a certain minimum degree of proximity between entertainer and patron in restaurants and bars, it may accomplish this by enacting reasonable regulations directly on that subject.

Appellants further assert that the distinction is justified because the patrons of
194 restaurants and bars have greater access to alcoholic beverages than the theatergoers, which may cause the former group to be prone to committing breaches of the public peace. Again, we note that this is not necessarily the case, as some theaters do make alcoholic beverages available to their patrons. And again, if the County is concerned that the patrons of bars featuring nude entertainment may attempt to commit breaches of the peace vis-a-vis the entertainers, it may enact reasonable regulations restricting the access of those patrons to the entertainers. No meaningful distinction appears between nude entertainment in theaters, on the one hand, and restaurants and bars on the other. Legislation attempting to ban this constitutionally protected activity in one category of facility while not in the other is a denial of equal protection, and, therefore, constitutionally impermissible.

SEVERABILITY.

[9] The remaining issue is that of severability. Having found that the County's ban on naked waiters and waitresses is valid but that its ban on naked entertainers is constitutionally impermissible,[5] we must determine whether the former may be severed from the latter, leaving the valid portions of the Ordinance enforceable. Constitutional portions of a statute may stand alone and remain in force if they can be separated from the portions which are void. With this Ordinance, we experience no difficulty in severability. Grammatically and conceptually, there is no problem. There is no necessity to read language into the Ordinance to preserve its constitutionality. (In re King, 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983.) Here, there is no general language which simultaneously sweeps up constitutionally protected and unprotected conduct in an indissoluble prohibition. (In re Hoffman, 67 Cal.2d 845, 64 Cal.Rptr. 97, 434 P.2d 353; In re Blaney, 30 Cal.2d 643, 184 P.2d 892.) The valid portions of this Ordinance concerning waiters and waitresses are mechanically and grammatically severable from those portions concerning entertainers and entertainment. The provisions concerning waiters and waitresses are valid, enforceable and severable from those invalid provisions concerning entertainers.

5. An interesting factual situation will present itself when an ingenious bar owner advertises naked singing waitresses.

SUMMARY.

In summary, we hold that those sections of Article 1, Section 311.011 of Orange County Ordinance No. 2356 pertaining to nude waiters or waitresses neither inhibit the exercise of respondents' rights under
[198] the First and Fourteenth Amendments, nor deny them equal protection of the law. Thus, the trial court was in error in granting an injunction forbidding enforcement of that portion of the Ordinance. However, Article 2, Section 311.021 of that Ordinance and that portion of Article 1 pertaining to entertainers do violate respondents' freedom of speech as interpreted by the *Barrows* and *Giannini* opinions, *supra*, and guaranteed by the First and Fourteenth Amendments and are also violative of the Equal Protection Clause. Thus, as regards this portion of the enactment the trial court was correct in granting respondents' request for injunctive relief.

Order affirmed in part and reversed in part.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

Dept. 2

Court convened at - - - M. December 3 19 69, present

Hon. ROBERT L. CORFMAN, Judge; Wilma White, Deputy Clerk;

- - -, Deputy Sheriff; - - -, Reporter;

and the following proceedings were had:

170792 CROWNOVER VS MUSICK

Order to Show Cause and Temporary Restraining Order.

The Court, having considered the points and authorities and the arguments of counsel offered on behalf of the respective parties, makes its order as follows: A preliminary injunction during the pendency of the action is granted as requested, as more particularly set forth on Page 2, Lines 5 to 15 of the Order to Show Cause and Temporary Restraining Order. Said ruling is based upon the grounds that the subject ordinance and subject assembly bills, also known as Sections 318.5 and 318.6 of the Penal Code of the State of California, violate the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States, and violate Article I, Sections 11 and 21, and Article XX, Section 18 of the Constitution of the State of California, in that there is no reasonable, logical, or factual basis for distinction wherein theaters, concert halls, or similar establishments should be exempted from the restrictions imposed by said legislation while other establishments identical in nature, if not in name or designation, and the persons working therein are made subject to the punishment provided by said legislation. The temporary restraining order shall remain in effect until the preliminary injunction is signed and filed. Plaintiffs' attorney is ordered to prepare the formal order. Counsel to be notified by mailing a copy of this order this date.

ENTERED 12/3/69

Statistical Code Use Only	1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.	12.	13.	14.	15.	16.

F3013-7.5

MINUTE ORDER
APPENDIX C

RECEIVED
DEC 4 1969

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 30 1973

DEAR SIR: *I have this day filed Order*

REHEARING DENIED

Appl for stay denied

In re: L.A. *No.* 29917

Crownover, et al.

on

Musick

Respectfully,

G. E. BISHEL
Clerk

APPENDIX D

AFFIDAVIT OF HARVEY S. OWEN

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

HARVEY S. OWEN, being first duly deposed and sworn, states that:

1. I am one of the plaintiffs in Crownover v. Musick, California Supreme Court No. L.A. 29917, and I am the owner and operator of that certain place of business known as Harvey's Guest House and also known as Harvey's, located at 15572 Coronado, in the County of Orange, State of California. Said business is licensed as a cocktail bar by the Department of Alcoholic Beverage Control of the State of California.

2. Since May, 1967, I have presented entertainment by topless dancers, who perform dances on a stage at the premises while their breasts are exposed. At no time during the approximately 6 years that such entertainment has been presented have any of the dancers employed by me been arrested or prosecuted for being lewd or obscene in the presentation of said entertainment.

3. Said premises are located in an industrial and agricultural area and there are no nearby residents to be disturbed by either the entertainment itself or by the traffic generated by the entertainment. During the aforesaid time there have not been any undue or disproportionate disturbances involving customers at the premises. There have not been any disturbances attributable to the presentation of the topless entertainment described above.

4. I am the owner of record of the real property where said business is operated and have an investment within said real property and building of approximately $65,000. I value the building, property and the going business at a sum considerably in excess of $125,000.

5. Since on or about May 1967 I have invested several thousand dollars in the promotion of and advertisement of the

3S52173

featured entertainment policy at Harvey's. Over the years I have built up a substantial clientele which comes to the premises for the purpose of viewing such entertainment. Prior to the establishment of said entertainment policy, Harvey's had an approximate monthly gross income of less than $6,000. During the most recent months that topless entertainment has been presented, the monthly gross income is in excess of $20,000.

6. Upon learning that the Supreme Court of the State of California had reversed the decision under which I was granted an injunction permitting me to present live, topless entertainment at Harvey's, I ceased presenting such entertainmement for a period of several days. The gross income of the business decreased by 20 to 30% during that period.

7. I would be unable to continue presenting such topless entertainment if I did not have the continued protection of an injunction against enforcement of Orange County ordinances which purport to prohibit such entertainment. If an order staying the effect of the California Supreme Court decision in Crownover v. Musick is not granted, I will be compelled to permanently discontinue such entertainment.

8. The presentation of topless entertainment at Harvey's is in all respects in compliance with the rules and regulations of the California Department of Alcoholic Beverage Control.

Dated: 5/23/73

Harvey S. Owen

Subscribed and sworn to before me this 23 day of May, 1973.

Notary Public in and for Said County and State

OFFICIAL SEAL
LANA M. FRITZ
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires March 7, 1977

3S52173

IN THE

Supreme Court of the United States

SEP 21 197

October Term, 1973
No. 73-344

HARVEY S. OWEN, individually and doing business as HARVEY'S GUEST HOUSE and JUNE CROWNOVER,

Petitioners,

vs.

JAMES A. MUSICK, in his capacity as Sheriff of the County of Orange, State of California,

Respondent.

Answer to Petition for Writ of Certiorari.

CECIL HICKS,
District Attorney, County of Orange, State of California,

MICHAEL R. CAPIZZI,
Assistant District Attorney,

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SUBJECT INDEX

Page

Statement of the Case 1

Questions Presented 3

1. Whether a State Statute or Ordinance Prohibiting Nude Waitresses and/or Entertainers Performing in a Public Place Violates the First Amendment of the United State's Constitution 3

2. Whether a State Statute or Ordinance Prohibiting Nude Waitresses and/or Entertainers Performing in Any Public Place Except in a "Theater Which Is Primarily Devoted to Theatrical Performances Violates the Equal Protection Clause of the Constitution of the United States 3

Argument 4

I.

Neither the Statute nor the Ordinance Violate the First Amendment of the Constitution 4

(a) Where the Statute Aims at Regulation Rather Than Suppression, the United States Supreme Court Has Decreed Valid the Restriction of Symbolic Speech as Contrasted With the Restriction of Pure Speech 4

(b) Statutory Prohibition Against Nudity in Public Places Has Been Found Constitutional by This Honorable Court 9

II.

Neither the State Statute nor the Orange County Ordinance Violate the Equal Protection Clause of the Fourteenth Amendment 12

Conclusion 19

TABLE OF AUTHORITIES CITED

Cases	Page
California v. LaRue, 34 L.Ed. 2d 365, 93 S. Ct. 368, 409 U.S. 109	18
Cameron v. Johnson, 390 U.S. 611, 88 S. Ct. 1335	7, 8, 12, 13
City of Portland v. Derington (Oregon) (1968), 451 P. 2d 111	9
Cox v. Louisiana, 379 U.S. 536	7
Crownover v. Musick, 9 Cal. 3d 405	3, 18
Feiner v. New York, 340 U.S. 315	4
Giannini, In re, 69 Cal. 2d 563	5
Giboney v. Empire Storage Co., 336 U.S. 490	7
Hoffman v. Carson, 250 So. 2d 891	11
Kelly v. Mahoney, 185 Cal. App. 2d 799, 8 Cal. Rptr. 521	15
Kovacs v. Cooper, 336 U.S. 77	4
Madden, Executor v. Kentucky, 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 2d 590, 125 A.L.R. 1383	14
Martin v. City of Struders, 319 U.S. 141	9
Miller v. California, ... U.S. ....; .... S. Ct. .... June 21, 1973	18
Morey v. Doud, 354 U.S. 457	15
People v. Glassey, unreported, Crim. A 2256	10
Railway Express Agency v. New York, 336 U.S. 106 (1949)	4, 16, 17
Rast v. VanDeman, 240 U.S. 342, 36 S. Ct. 370, 6 L.Ed. 679	14
Richfield Oil Corporation v. Franchise Tax Board, 169 Cal. App. 2d 331, 337 P.2d 237	14

Page

Roth v. U.S., 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S. Ct. 1304 9

Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155 8

State v. Brown, 165 Ohio St. 31, 50 Ohio Ops. 45, 133 N.E. 2d 333 10

Street v. New York, 89 S. Ct. 1354 7

Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733 .....7, 13

United States v. Mussellshell State Bank, 60 F. 2d 157 11

United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673 .....5, 7, 9

Statutes

California Penal Code, Sec. 318.5 2

California Penal Code, Sec. 318.6 2

Orange County Ordinance No. 2356 2

United States Constitution, First Amendment 3, 4, 5, 6, 7, 8, 9, 13

United States Constitution, Fourteenth Amendment 2, 12, 16

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-344

HARVEY S. OWEN, individually and doing business as HARVEY'S GUEST HOUSE and JUNE CROWNOVER,

Petitioners,

vs.

JAMES A. MUSICK, in his capacity as Sheriff of the County of Orange, State of California,

Respondent.

Answer to Petition for Writ of Certiorari.

Statement of the Case.

On November 21, 1969, a complaint for Declaratory Relief and injunction was filed by June Crownover, Harvey S. Owen, individually and doing business as Harvey's Guest House; Richard W. Carson and Robert A. Werner, partners doing business under the firm name of "Tuscan Room" also known as "Lil Annie's Room"; Samuel G. Mead and Roy Sikes, partners doing business under the firm name of "The Lamplighters" (hereinafter referred to as Real Parties) against James A. Musick in his capacity as Sheriff of Orange County, State of California, County of Orange and John Does, I through C inclusive (Case No. 170792).

The above complaint in its sailent parts alleges that Real Parties are all owners of places of business currently operating under on-sale licenses issued by the Department of Alcoholic Beverage Control, State of California, and presently presenting live entertainment to adult persons in the form of bare-breasted female dancers and nude dancers who perform on an elevated stage apart from the patrons in said establishment. It further alleges that Sections 318.5 and 318.6 of the California Penal Code and Ordinance No. 2356, Title 3, Division 11 of the Codified Ordinance of the County of Orange duly passed under authority of Sections 318.5 and 318.6 of the Penal Code are unconstitutional on their faces and as applied because they violate the First Amendment and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

On November 21, 1969, based on the above complaint and Declarations, the Superior Court of Orange County granted the temporary restraining order sought by the Petitioners, prohibited enforcement of the ordinance and ordered Respondent to appear on December 2, 1969, and show cause why a preliminary injunction should not issue.

On December 2, 1969, no evidence having been sought by or presented to the Court, the Court having read the points and authorities of both parties and heard oral arguments offered by all parties granted the preliminary injunction on the basis that both the statute and the ordinance are in violation of the equal protection clause of the Fourteenth Amendment . . . "(I)n that there is no reasonable, logical or factual basis for distinction wherein theaters, concert halls, or similar establishments should be exempted from the

restrictions imposed by said legislation while other establishments identical in nature, if not in name or designation, and the persons working therein, are made subject to the punishment provided by said legislation." (Min. Ord. of December 3, 1969.)

A Writ of Prohibition and a Petition for Hearing having been sought by Appellant and having been denied, an appeal followed. On June 18, 1971, the District Court of Appeals reversed the order of the Superior Court as to the waitresses but affirmed that portion of the order relating to dancers and entertainers. On May 1, 1973, the California Supreme Court reversed the order of the Superior Court and declared the Orange County ordinance and other similar ordinances to be valid. (See *Crownover v. Musick*, 9 Cal. 3d 405.)

Questions Presented.

1. Whether a state statute or ordinance prohibiting nude waitresses and/or entertainers performing in a public place violates the First Amendment of the United States Constitution.

2. Whether a state statute or ordinance prohibiting nude waitresses and or entertainers performing in any public place except in a "theater which is primarily devoted to theatrical performances violates the equal protection clause of the Constitution of the United States."

ARGUMENT.

I.

Neither the Statute nor the Ordinance Violate the First Amendment of the Constitution.

(a) Where the Statute Aims at Regulation Rather Than Suppression, the United States Supreme Court Has Decreed Valid the Restriction of Symbolic Speech as Contrasted With the Restriction of Pure Speech.

The statute and ordinance in question are not aimed at what is said but at what is done. They thus aim at regulation, not at suppression.

The power of the State to regulate conduct, even in the important area of free speech, has never been questioned. For example, advertising is a mode of expression, but *Railway Express Agency v. New York,* 336 U.S. 106, 93 L.Ed. 533, 69 S.Ct. 463 (1949), approved of an ordinance limiting advertising on public conveyances. The right to assemble is also a First Amendment right but *Feiner v. New York,* 340 U.S. 315, 95 L.Ed. 295, 71 S.Ct. 303, shows that the right cannot be freely indulged into in all places. The right to freely express and advocate opinion or ideas is at the very core of the First Amendment but *Kovacs v. Cooper,* 336 U.S. 77, 93 L.Ed. 513, 69 S.Ct. 448, clearly shows that the state may regulate by prohibiting the use of sound trucks.

In light of constitutional history, the regulatory power of the state is unquestionable as it is unquestionable that certain forms of expression (to wit political and religious) stand higher in the scale of importance than do other forms. (advertising or dancing for example). Reading of the statute and ordinance shows that what is here prohibited is the nakedness of certain parts of the

anatomy in places where food and beverages are served. Petitioner's hue and cry is that "Nudity per se is protected by the First Amendment."

Respondent submits that nudity *per se* is not protected by the First Amendment and becomes protected only when it is integral to an "expression" of some idea, *i.e.*, when it becomes an act of *symbolic speech. In re Giannini,* 69 Cal.2d 563, did not say, as has been contended, that *nudity* is a form of expression but that the dance is a form of expression and that nudity integral to it could not be suppressed when it is *integral* to it.

To elucidate further: a photograph depicting a dog is a form of expression and is protected, as are photographs depicting pigs, jackals or the naked female. But does it follow that *the* depicted dog, pigs, jackals and naked females are protected by the First Amendment? A naked marble statue is a form of expression, but is the marble protected before the work begins? Clearly not. Nudity, therefore, it not *per se* cloaked with First Amendment protection and is only entitled to protection when it is found in the context of a performance.

Even assuming the conduct here involved to be within the scope of a performance, the prohibition of the statute goes not to the performance itself but to the element of "nakedness" contained within the performance. But "nakedness" must be classed as "symbolic speech" not as speech proper and in recent years this Honorable Court has set a different test for the protection of "symbolic speech" than it has for speech proper. *United States v. O'Brien,* 391 U.S. 367, 376, 20 L.Ed. 2d 672, 88 S.Ct. 1673, sets forth the test. There this court refused to strike down a statute which prohibited the burning of draft cards and stated:

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea . . . This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

In applyng the concepts set forth in *O'Brien,* the Court has upheld conduct which was *per se* innocuous while condemning conduct conducive to disruption.

Thus, for example, while declaring that the wearing of armbands by students was "symbolic free speech" within the protection of the First Amendment (See *Tinker v. Des Moines Independent Community School District,* 89 S.Ct. 733, 394 U.S. 11, 22 L.Ed. 2d 44) this court did not hesitate to allow regulation of similar conduct under circumstances where the conduct might be conducive to disruption (*Cf. e.g. Cox v. Louisiana,* 379 U.S. 536, 555, 13 L.Ed. 2d 471, 85 S.Ct. 453).

Moreover, it rarely has been suggested that constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute (*Cf. Giboney v. Empire Storage Co.,* 336 U.S. 490, 93 L.Ed. 834, 69 S.Ct. 684, and *Street v. New York,* 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed. 2d 572, where the court distinguishes between the "symbolic act" of burnng a flag and spoken words).

In another field involving far more important First Amendment rights than the one now under consideration this court in differentiating between absolute prohibition and regulation of conduct in *Cameron v. Johnson,* 390 U.S. 611, 617, 88 S.Ct. 1335, 1338-1339, 20 L.Ed. 2d 182 has stated:

> The argument centers on the fact that the prescription of the statute embraces picketing employed as a vehicle for constitutionally protected protest. But "picketing and parading [are] subject to regulation even though intertwined with

> expression and association," *Cox v. State of Louisiana,* 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed. 2d 487, and this statute does not prohibit picketing so intertwined unless engaged in a manner which obstructs or unreasonably interferes with ingress or egress to or from the courthouse. Prohibition of conduct which has this effect does not abridge constitutional liberty "since such activity bears no necessary relationship to the freedom to * * * distribute information or opinion." *Schneider v. State,* 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155.

It is thus clear from the above that *conduct,* that is, symbolic speech can be *controlled* even if it cannot be suppressed. Accordingly, a state statute controlling conduct under certain circumstances does not run afoul of the First Amendment prohibition.

Where, as here, the element of "nakedness" does not seriously hinder "the marketplace of ideas" the statute cannot be struck down. The waitress is not less of a waitress and more of a performer because of lack of adequate clothing on her body. Nor is nudity a necessary attribute of the form of expression called go-go dancing. It is thus a separate adjective that can be separately prohibited without infringement on First Amendment rights. *Cameron v. Johnson,* 390 U.S. 611, 617, 88 S.Ct. 1335, 20 L.Ed. 2d 182 states:

> Prohibition of conduct which has this effect does not abridge constitutional liberty since such activity bears no necessary relationship to the freedom to distribute information or opinion.

As *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed. 2d 672 states:

> We cannot accept the view than an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea.

Additionally, Respondent submits that not only is the protection of nudity not proper First Amendment protection but also that the prohibition of nude appearances does not in any way "contract the spectrum of knowledge" (See *Martin v. City of Struders,* 319 U.S. 141, 87 L.Ed. 1313, 63 S.Ct. 862) so as to require First Amendment protection. As Justice Douglas has said in *Roth v. U.S.,* 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304:

> I assume there is nothing in the constitution which forbids congress from using its power over the mails to proscribe *conduct* on the ground of good morals. No one would suggest that the first amendment permits nudity in public places . . .

Accordingly, Respondent submits that a statute merely regulating such conduct by limiting it to certain places cannot be considered unconstitutional.

(b) Statutory Prohibition Against Nudity in Public Places Has Been Found Constitutional by This Honorable Court.

The case of *City of Portland v. Derrington* (Ore. 1968), 451 P.2d 111, 113, *cert. den.* November 17, 1969 involved a similar city ordinance, proscribing the exhibit of one or both female breasts in any public place where food or alcoholic beverage was offered for consumption. That court concluded:

> When nudity is employed as a sales promotion in bars and restaurants, nudity is conduct. As

> conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor despensaries and the fixing of their closing hours. . . .
>
> The question is not one of legislative wisdom but one of constitutional power. The chief aim of the ordinance is to regulate conduct deemed by the lawmakers to be injurious to health, safety and morals. The city's legislative judgment in the matter should be upheld unless the statute unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct. We do not believe the interference with communication in the case at bar has enough substance to present a First Amendment question.

The fact that a restriction upon the "commercial exploitation" of the nude or semi-nude female incidentally encompasses the costume worn by dancers does not make the restriction unconstitutional. It is not a restriction upon freedom of speech but rather a restriction placed upon commercial conduct to protect the best interests of the public.

In *State v. Brown,* 165 Ohio St. 31, 59 Ohio Ops. 45, 133 N.E.2d 333 at 335 (appeal dismissed 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed. 2d 82), the court held valid a statute prohibiting nudist camps.

In *People v. Glassey,* unreported, Crim. A. 2256 (certiorari denied 332 U.S. 790, 68 S.Ct. 99, 92 L.Ed. 372, Oct. 29, 1947), the Appellate Department of the Superior Court of the County of Los Angeles held valid as against objections similar to those of the Real Parties in Interest, an ordinance of the City of Los Angeles prohibiting conducting any camp where three

or more persons not all of the same sex are permitted or allowed to commingle in the nude.

All the above cases this Honorable Court has refused to review. Pertinent is the statement in *United States v. Mussellshell State Bank*, 60 F.2d 157 at 159:

> While the denial of a writ of certiorari, . . . imports no expression of opinion upon the merits, it is a circumstance that may well have thoughtful consideration, in connection with other related questions.

Finally, Respondent submits that this case parallels that of *Hoffman v. Carson*, 250 So.2d 891, appeal dismissed by this Honorable Court on December 7, 1971, "for lack of a federal question." In that case the Florida Court considered and found constitutionally valid the application of an indecent statute to a naked beer bar dancer. In rejecting the defendant's claim of constitutional invalidity that court aptly stated at page 893:

> Appellant loses sight of the distinction between speech and conduct. The statute is not directed at First Amendment rights of free expression nor does it concern itself with obscenity as does Fla. Stat. Chapter 847, F.S.A. Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law [*e.g. Commonwealth v. Broadland*, 315 Mass. 20, 51 N.E.2d 961 (1943); *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241 (1952)], and generally considered as having a reasonable relationship to the public welfare, and therefore, within the police power of the Legislature.

II.

Neither the State Statute nor the Orange County Ordinance Violate the Equal Protection Clause of the Fourteenth Amendment.

Since the statute and ordinance do not "suppress" but regulate behavior by restricting it to certain places, the statute or ordinance can only be struck down if unreasonable or arbitrary within the context of the due process or equal protection clauses of the Fourteenth Amendment.

In determining whether a statute or an ordinance constitutes a reasonable restriction within the due process clause of the Fourteenth Amendment, the Supreme Court of the United States has always balanced the interests of the various parties.

The amount of restriction that can be imposed depends on the State interest viewed in relation to the value of the conduct which the State seeks to limit and, as stated in *Cameron v. Johnson, supra,* on whether the conduct prohibited bears a true relationship to expression. In the case at bar, the statute prohibits nudity by performers and waitresses in a restaurant or bar. The value of such nudity to society is *de minimis* indeed, and its value as symbolic free speech under the circumstances is even more remote.

The State interest, on the other hand, is based on police and possibly health reasons.

The enabling statute here in question prohibits topless or bottomless waitresses or entertainers in any establishment which

> [S]erves food, beverages, or food and beverages, including but not limited to, alcoholic beverages, for consumption on the premises of such establishment.

The ordinance follows the enabling act almost verbatim. Both exclude from the prohibition a concert hall, theater or similar establishment which is *primarily* devoted to theatrical performances.

The statute has a presumption of validity, and the burden of proving its unreasonableness is on the Petitioners who have merely alleged unreasonableness and discrimination because they can find "no reason" for the classification. The statute, in fact, taken as a whole applies to all public places except those places which are primarily devoted to *theatrical* performances. Since a place devoted to a theatrical performance generally allows for no contact between the public and the performers who are on the stage, the differentiation is proper. Since it is indeed conceivable that where there is contact between the naked performers and the public, such contact might have been found to be conducive to disorderly conduct. Conversely, a place primarily devoted to the showing of theatrical performances normally having a fixed stage and greater distance between viewers and performers, could have been found to be less conducive to the creation of public disturbances.

Finally, given the statements made by this court in *Cameron* and *Tinker, supra,* and the very strong inference that only materials, *i.e.*, work products, are protected by the First Amendment, it is not unreasonable for the Legislature to limit the granting of First Amendment protection to nudity only when it is

within the context of a *theatrical* performance in a place devoted *primarily* to theatrical performances.

In *Rast v. Van Deman*, 240 U.S. 342 at 357, 36 S.Ct. 370, 60 L.Ed. 679 at 687, This Honorable court has stated:

> . . . It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and that the existence of that state of facts at the time the law was enacted must be assumed. . . . It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.

Richfield Oil Corporation v. Franchise Tax Board, 169 Cal.App.2d 331 at 336, 337 P.2d 237, quotes as follows from *Madden, Executor v. Kentucky*, 309 U.S. 83 at 88, 60 S.Ct. 406, 84 L.Ed. 2d 590 at 593, 125 A.L.R. 1383 at 1386:

> . . . The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. In both cases, classification was the issue. Here, it must be presumed that the Legislature found that in a theatre, the performers are further away from the audience than in a bar or cafe and that, because of fixed seats and other reasons, contact between customers and performers was far less likely.

There is a far greater difference between a theatre and a place of business such as maintained by Petitioners than there is between a chicken ranch and a turkey ranch, yet a distinction between the latter two was held

valid in *Kelly v. Mahoney, supra,* 185 Cal.App.2d 799 at 805, 8 Cal.Rptr. 521, the court saying:

> The application of the above principles to the present case does not improperly classify turkey ranches or deny the respondent the equal protection of the law. The ordinance requires that turkey ranches in a designated zone shall have a cover crop or employ other dust control methods. The ordinance is uniform in its application. The prohibition applies to all turkey raising. The Board of Supervisors, the legislative body of the county, obviously was at liberty to consider the dust control problems in the raising of turkeys and legislate with reference thereto. The question of whether or not the chicken ranches created a sufficient problem to require the same restrictions as were applied to turkey ranches was a question of policy for the Board of Supervisors to decide, and the Court was not justified in holding that the classification was unreasonable. We believe that the Court in the instant case sought to exercise a discretion that was exclusively within the power of the Board of Supervisors.

Speaking of the power of the state to classify, *Morey v. Doud,* 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344 at page 463 stated:

> 1) The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2) A classification

> having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.

That case further points out that the equal protection clause of the Fourteenth Amendment "does not require that every state regulatory statute apply to all in the same business," (p. 465) and that the amendment "cannot be invoked to protect a business from the general hazards of competition."

In *Railway Express Agency v. New York*, 336 U.S. 106, 109, 93 L.Ed. 533, 69 S.Ct. 463, the court states:

> It is pointed out that the regulation draws the line between the advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what

> the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.

The court then concludes at page 110:

> We cannot say that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. *Patsone v. Commonwealth of Pennsylvania,* 232 U.S. 138, 144. . . . And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all. . . .

A look at the statute and ordinance in light of the above language shows that the statute and ordinance are not discriminatory. In effect, all the statute and ordinance do is to state that where the *primary* business is the presentation of theatrical performances, nakedness is allowed. Where food and drink are served and thus by inference where the entertainment is a secondary rather than a primary purpose, nakedness is not allowed.

By contrast, the affidavits attached to the answer to the complaint in this case show that in Orange County territory no single theater as described by the statute has either food, beer or liquor license for service inside the premises. And no arrests for lewd conduct have taken place there. Should a theater or other concert hall serve food or beer, its *primary* purpose would no longer be the production of theatrical performances, and the theater or concert hall would then come within the prohibition of the statute.

Respondent thus submits that for Petitioners to claim discriminatory classification under the statute has no more merit than if the theaters were to be here complaining of discriminatory classification because they are not given a beer or liquor license.

Other arguments presented by Petitioners attempting to apply the *Miller v. California*, ... U.S. ...., ... S.Ct. .... (June 21, 1973) rationale to the case at hand are frivolous since as shown above the ordinance is aimed at *nudity*, not at obscenity. *California v. LaRue*, 34 L.Ed. 2d 365, 93 S.Ct. 368, 409 U.S. 109, is also not here applicable since as the *Crownover* opinion points out at note 15:

> The only language in the opinion potentially applicable to the instant matter involved *regulation of motion pictures as well as live entertainment* and thus is distinguishable since the ordinances herein do not regulate motion pictures.

Conclusion.

For all the reasons above stated Respondent respectfully urges this Honorable Court to deny the Petition for Certiorari.

Dated this 20th day of September 1973.

Respectfully submitted,

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